83-5

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH DISASTER AT WARSAW, POLAND, ON MARCH 14, 1980, MDL 441

POLSKIE LINIE LOTNICZE (LOT POLISH AIRLINES),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the Court now should decide the internationally important treaty interpretation questions which were not decided by the Court in *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, 390 U.S. 455 (1968), *affirming by an equally divided court*, 370 F.2d 508 (2d Cir. 1966), in view of subsequent and significant developments, including rejection of the Second Circuit's interpretation of the Warsaw Convention in the *Lisi* case by the highest court of another party to the treaty, the Supreme Court of Canada?

2. Whether the treaty sanction of absolute and unlimited liability without fault, which is imposed "if the carrier accepts a passenger without a passenger ticket having been delivered", is imposed properly when a ticket has been delivered but where the ticket has an "irregularity" in the type-size of the statement that the transportation is subject to the liability rules of the Warsaw Convention?

3. Whether the treaty sanction of absolute and unlimited liability without fault provided in Article 3(2) of the Warsaw Convention is imposed properly where the only "irregularity" with respect to any ticketing requirements is non-compliance with a private agreement among

air carriers which does not provide for any sanction for non-compliance?[1]

[1] The following persons were parties before the United States Court of Appeals for the Second Circuit: Henryka Smiegel, individually and as administratrix of the estate of Stephen Smiegel, deceased; Jose and Juana Pimentel, individually and as co-administrators of the estate of George Pimentel, deceased; Emily Bland, Individually and as Administratrix of the Estate of Joseph F. Bland, deceased; Rev. Raymond E. Wesson and Emogene Hall, as Co-Administrators of the Estates of Ray Lamar Wesson, deceased, and Deloras Ann Wesson, deceased, and as Co-Guardians of Ray Lamar Wesson, Jr., Allison Lynn Wesson, Dave Newton Wesson and Jason Manning Wesson, infants; Patricia Ann Chavis, Individually as surviving wife, as Guardian of Patricia Anita Chavis, infant, and as Administratrix of the Estate of Elliott Chavis, deceased; Susan Janice Radison, surviving wife, John Michael Radison, Dawn Michelle Radison and Ronald Ray Radison, surviving children and Mary Radison, surviving mother of John Dan Radison, deceased; Angela Y. Robles, and Margaret Ojeda, Co-Administrators of the Estate of Yrenio Roman Robles, Jr., AKA Junior Robles, Deceased; John Lindsay and Vanoria Lindsay, individually and as co-administrators of the estate of Byron Maurice Lindsay, deceased.

TABLE OF CONTENTS

Table of Authorities

Cases:

No. .....

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit appears in the Appendix to this Petition (App. 1a-16a) and is reported at 705 F.2d 85 (2d Cir. 1983). The opinion of the United States District Court for the Eastern District of New York also appears in the Appendix (App. 17a-44a) and is reported at 535 F. Supp. 833 (E.D.N.Y. 1982).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered April 8, 1983. App. 45a-46a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1966).

Treaty Involved

The provision of the Warsaw Convention[2] involved is Article 3. It provides:

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970) (herein Warsaw Convention).

> the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

49 Stat. 3015, App. 96a.[3]

Statement of the Case

Respondents' decedents were aboard an Ilyushin-62 jet aircraft owned and operated by Petitioner Polskie Linie Lotnicze (LOT Polish Airlines and hereinafter LOT) when it crashed on March 14, 1980 in Warsaw, Poland as the aircraft was making its final approach to land after a non-stop journey from New York's John F. Kennedy International Airport. Respondents commenced wrongful death actions in various district courts[4] and all actions ultimately were transferred to the United States District Court for the Eastern District of New York for coordinated or consolidated pretrial proceedings by order of the Judicial Panel on Multidistrict Litigation. 28 U.S.C. §1407 (1976).

Respondents' decedents were all travelling pursuant to tickets issued by LOT which provided for "international transportation" as defined by Article 1(2) of the Warsaw Convention. Since the passenger tickets of Respondents' decedents involved relevant points in the United States, certain provisions of a private agreement among airlines,

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[3] The French text of Article 3, which is the official text ratified by the Senate (49 Stat. 3000; *Reed* v. *Wiser*, 555 F.2d 1079, 1082 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967)), is reproduced at App. 96a.

[4] Subject matter jurisdiction in the District Court was based upon diversity of citizenship (28 U.S.C. §1332) and, in one case, upon federal question (28 U.S.C. §1331).

commonly known as the Montreal Agreement,[5] also applied to their transportation by virtue of their inclusion in LOT's tariffs filed with the Civil Aeronautics Board (CAB).

These provisions of the Montreal Agreement provide, in summary, that with respect to "international transportation" as defined in the Warsaw Convention which includes a point in the United States as a point of origin, destination or agreed stopping place, a participating carrier agrees that the limit of liability for each passenger for death or personal injury shall be $75,000 and that it shall not avail itself of any defense under Article 20(1) of the Warsaw Convention with respect to any claim arising out of the death or personal injury of a passenger.

Although not included in LOT's tariffs or incorporated in the passenger ticket, an airline which is a party to the Montreal Agreement, also agrees that at the same time as delivery of the passenger ticket, a notice shall be delivered "which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope" as follows:

> ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY
>
> Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the

[5] Agreement CAB 18900 (App. 73a, 75a), approved by CAB Order E-23680, 31 Fed. Reg. 7302 (1966) (hereinafter Montreal Agreement) (App. 68a).

> Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of [(name of carrier) and certain other] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000.
>
> The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.
>
> Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

App. 73a-74a (hereinafter Montreal Advice) (Original amounts of $8,290 and $16,580 subsequently amended and rounded to $10,000 and $20,000, respectively, by CAB Order 74-1-16, 39 Fed. Reg. 15,526 (1974)).

In accordance with the options in the Montreal Agreement, the LOT tickets contained the Montreal Advice as an integral part of the passenger tickets. An actual size reproduction of the Montreal Advice as contained on the LOT tickets of Respondents' decedents is in the Appendix

to the Petition. App. 113a. However, the Montreal Advice in the LOT passenger tickets at issue was printed in 8.5 point type-size rather than the specified 10 point modern type-size.[6]

In answering the various complaints, LOT alleged an affirmative defense, based upon the provisions of Article 22 of the Warsaw Convention limiting liability for death or other bodily injury and that portion of the Montreal Agreement which effectively increased the Convention liability limit, seeking to limit the liability of LOT for the damages alleged in each complaint to the sum of $75,000. Pursuant to Respondents' motions for partial summary judgment, the District Court dismissed LOT's limitation of liability defense and exposed LOT to absolute and unlimited liability without fault because the Montreal Advice in the LOT passenger tickets was printed in 8.5 point type size rather than the specified 10 point modern type size. The District Court certified for interlocutory appeal pursuant to 28 U.S.C. §1292(b) the "issues decided herein with regard to defendant's affirmative defense of limitation of liability". 535 F. Supp. at 845, App. 44a. LOT's petition for permission to appeal was granted by the Second Circuit on August 19, 1982. On appeal the Court of Appeals affirmed the order of the District Court.

Although Article 3(2) of the Warsaw Convention only imposes the sanction of unlimited liability for failure to deliver a ticket, the Second Circuit in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *affirmed by an equally divided court*, 390 U.S. 455 (1968) (hereinafter referred to as *Lisi*), interpreted the language of Article 3(1)(e), that the ticket have a "*statement* that the transportation is subject to the rules relating to liability

[6] An actual size reproduction of the Montreal Advice in 10 point modern type is located at App. 114a.

established by" the Warsaw Convention, as a requirement for *notice* of the liability limitation before a carrier may invoke the limitation. Petitioner argued, both in the District Court and in the Court of Appeals, that the Montreal Advice in the LOT passenger tickets complied with the requirements of Article 3(2) of the Convention, even as interpreted in *Lisi*.

The Court of Appeals appeared to conclude that the Montreal Advice in the LOT passenger tickets provided the "adequate notice" required by its interpretation of Article 3(2) in *Lisi* (705 F.2d at 89, App. 11a), but nevertheless affirmed the dismissal of the affirmative defense of limitation of liability. The Second Circuit extended its prior holding in *Lisi* and concluded that failure to comply with the 10 point modern type size specification in the Montreal Agreement was equivalent to a failure to comply with Article 3(2) as interpreted in *Lisi*, notwithstanding that the Montreal Agreement itself contains no sanction for failure to comply with its provisions and that the Second Circuit appeared to agree the Montreal Advice on the LOT passenger tickets provided "adequate notice" in compliance with the Warsaw Convention. The Article 3(2) treaty sanction of absolute and unlimited liability without fault for failure to deliver a ticket was imposed upon LOT for an "irregularity" in its ticket which was a technical violation of a private agreement among airlines.

In accordance with *Lisi*, but contrary to the plain wording of Article 3(2), the Second Circuit reasoned that Article 3(2) imposes upon carriers, such as LOT, a duty to inform passengers of liability limitations and that a failure to do so, measured either by the terms of Article 3 or the Montreal Agreement, results in imposition of the sanction. The Second Circuit also held that the specification of type size is as important as the requirement of ticket delivery

for Article 3(2) purposes, as interpreted in *Lisi*, and LOT's failure to comply with the type-size specification in the Montreal Agreement (a private agreement among airlines) should prevent LOT from taking advantage of any treaty liability limitation.

However, Article 3(2) of the Warsaw Convention itself only requires delivery of a ticket before an airline can avail itself of the limitation of liability provided by Article 22(1) of the Convention. In pertinent part, Article 3(2) provides that "if a carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." 49 Stat. 3015, App. 97a. LOT delivered a ticket which provided "adequate notice" and certainly, therefore, LOT complied with the Article 3(2) requirements. No part of the Montreal Agreement altered, amended or otherwise affected Article 3(2), but the Court of Appeals indulged in judicial treaty making and, without any precedent, extended and perpetuated the erroneous *Lisi* interpretation of Article 3(2) to incorporate the Montreal Agreement type-size specification into that Article.

Reasons for Granting the Writ

1. The decision of the court below has perpetuated an interpretation of a treaty of the United States, the supreme law of the land,[7] in direct conflict with the plain language of the treaty, the clear intent of the parties to the treaty as shown in the "legislative history", the official position of the Executive Branch of the United States Government, the interpretation of other parties to the treaty and of all

[7] U.S. CONST. art. VI, cl. 2.

the respected international commentators on the Convention and, finally, in conflict with every reported authority that has considered the same point. The decision below so defeats the scheme of the Warsaw Convention as to result in virtual denunciation of this treaty, a step which the United States Government refused to take in May, 1966.[8]

As so accurately characterized by Circuit Judge Moore in his strong dissenting opinion in *Lisi*:

> The majority in their opinion indulge in judicial treaty-making.
>
> . . . .
>
> The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a "one-sided advantage" is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability.

370 F.2d at 515.

The court below has intruded further than *Lisi* into the prerogative of the Executive to make treaties and so far exceeded the permissible limits of treaty interpretation[9] as to require the exercise by the Supreme Court of its supervisory powers, if the reputation of the United States for good faith, honor, and integrity in dealing with other nations is to be preserved.

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[8] 32 J. Air L. & Com. 243 (1966).

[9] Delineated by decisions of the Court over many years. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, —— U.S. ——, 72 L. Ed.2d 765, 102 S. Ct. 2374 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940); *Valentine* v. *United States*, 299 U.S. 5 (1936); *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933); *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931); *Nielsen* v. *Johnson*, 279 U.S. 47 (1929); *De Geofroy* v. *Riggs*, 133 U.S. 258 (1890).

(a) Several significant developments have occurred since the Court considered *Lisi* which spotlight the issue left unresolved there that is raised anew by the decision below. In *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, 390 U.S. 455 (1968), the Court was presented with, *inter alia*, the following question:

> 1. Whether Article 3(2) of the Warsaw Convention requires, under the sanction of depriving the carrier of those treaty defenses which exclude or limit its liability, the inclusion in the passenger ticket of either the statement in Article 3(1)(e) or a notice that the treaty limits the liability of the carrier?

Brief for the Petitioner at 2, *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi, supra* (footnotes omitted). However, the Court did not resolve that issue because the judgments of the Second Circuit were "affirmed by an equally divided Court." [10] *Lisi*, 390 U.S. 455 (1968). At the time the *Lisi* case was before the Court in 1968, no court in any other country which is a party to the Warsaw Convention had considered or decided the *Lisi* question.

That same issue, which the Court did not decide in *Lisi*, subsequently was reached and decided by the Supreme Court of Canada in *Ludecke* v. *Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979).

> The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred

[10] Mr. Justice Marshall did not participate. The Court does not pass on an issue upon which it is equally divided. The judgment of the lower court simply remains in effect. *Anderson* v. *Johnson*, 390 U.S. 456 (1968); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107 (1868); *Etting* v. *Bank of United States*, 24 U.S. (11 Wheat.) 59 (1826).

> to above [including *Lisi*] which hold that delivery of a ticket with an irregularity, that is, a statement as required by Article 1[sic] (e) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier delivered a ticket and thus preserved its right to the limitation.

98 D.L.R.3d at 57-58.

In addition, after *Lisi*, other courts considering the adequacy of the "notice" on a passenger ticket have found type sizes smaller than the 8.5 point type of the LOT passenger ticket to be adequate. *Milliken Trust Co.* v. *Iberia Lineas Aereas De Espana, S.A.*, 11 Av. Cas. (CCH) 17,331 (Sup. N.Y. 1969), *aff'd without opinion*, 36 A.D.2d 582 (App. Div. 1971) (8 point type); *Ludecke* v. *Canadian Pacific Airlines*, 53 D.L.R.3d 636 (Que. C.A. 1971), *aff'd on other grounds, supra* (4.5 point type).

Moreover, apart from the Supreme Court of Canada's rejection of the Second Circuit's decision in *Lisi*, other parties to the Warsaw Convention[11] and respected international commentators on the Convention have condemned the *Lisi* decision.[12]

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[11] Brief for the United Kingdom as *Amicus Curiae* at 3, *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, 390 U.S. 455 (1968); Brief of Canada as Amicus Curiae at 6, 9 n.5, *Id.* See also *Ludecke, supra.*

[12] *See* C. SHAWCROSS & K. BEAUMONT, AIR LAW ¶447 (4th ed. Noter-up 1982) (The editors reject the *Lisi* rationale when discussing *Montreal Trust Co.* v. *Canadian Pacific Airlines, Ltd.*, 72 D.L.R.3d 257 (Can. 1976), and *Ludecke, supra*); G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 88 (1977) (The author discusses a French case, *Canale* v. *Air France*, which forcefully rejected the *Lisi* rationale and holding).

The worldwide rejection of the *Lisi* interpretation of Article 3 continues today.

> It is submitted that the *Lisi* rule with its constructive elimination of the statement on the application of the Warsaw Convention and its finding for unlimited liability in the case of the constructive absence of a ticket violates the intentions of the drafters and the clear text of Article 3(2). . . . Moreover, the propositon that passengers must be specifically made aware of limitations of the carrier's liability manifests a schizofrenic jurisprudence of American courts. Indeed they held consistently that limitations of liability contained in tariffs for domestic carriage filed with the Civil Aeronautics Board, Washington, can be invoked against a passenger or a shipper of goods even if they were not aware of these limitations. . . .
>
> Finally, and foremost, it is submitted that the *Lisi* and *Mertens* rulings are indefensible because the limitation of liability applies *de lege* inasmuch as the Convention is part of the law of the ratifying State and 'the Convention applies by its own terms, and not because the parties have so agreed'. . . .

R.H. Mankiewicz, The Liability Regime of the International Air Carrier 98-99 (1981). (citations omitted).

Inasmuch as the decision of the court below raises the same issue presented in *Lisi* and interprets a treaty of the United States directly at odds with the holding of the Supreme Court of Canada in *Ludecke* and with respected commentators on the Convention, the Court should now decide this important question involving the proper interpretation of a multilateral treaty of the United States.

(b) The decision below is but another example of the determined efforts of lower courts in the United States to avoid the unpopular limitations of liability for personal injury or death[13] suffered by a passenger travelling in "international transportation" governed by the Warsaw Convention.[14] As the Second Circuit did here and in *Lisi*, such results require a strained reading of the Convention's wording or, commonly, complete indifference to the provisions of the Convention and its expressed goal of uniformity in the law applicable to international transportation by air. This results in the jurisprudence on the Warsaw Convention in the United States being unique and at odds with the jurisprudence of the other parties to the Convention.

As one of its primary goals, the Warsaw Convention was drafted and adopted in order to achieve uniformity in the applicable law governing international transportation by air.[15] Not only does the official title of the Convention announce that purpose, but also the preamble specifically states that the purpose of the Convention was to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents

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[13] The Court currently has before it a case that would avoid for the future the Warsaw Convention liability limits for property damage. *Franklin Mint Corp.* v. *Trans World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 13, 1983) (No. 82-1186). See *Boehringer Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981), *app. pending*, No. 81-2519 (5th Cir. argued March 1, 1983).

[14] *Franklin Mint Corp.* v. *Trans World Airlines, Inc.*, *supra*, note 13; *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978), *rev'd*, 684 F.2d 1301 (9th Cir. 1982); *Reed* v. *Wiser*, 414 F. Supp. 863 (S.D.N.Y. 1976), *rev'd*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

[15] Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

used for such transportation and of the liability of the carrier." [16] The United States explicitly recognized the goal of uniformity when the Convention was ratified. Secretary of State Cordell Hull said, "[i]t is obviously an advantage to passengers, shippers and aerial carriers to have international uniformity in international air transportation." [17] Moreover, the Warsaw Convention has been aptly described by the court below on another occasion as an "international uniform law" [18] and should, therefore, be interpreted uniformly by the courts of the parties to the Convention.

The rationale and holding in both *Lisi* and the court below are, however, contrary to the interpretation of Article 3 followed by other parties to the Warsaw Convention[19] and enunciated by respected international commentators on the Convention.[20] In other words, the decision and holding below and the *Lisi* rationale upon which the Second Circuit relied are unique to the United States and have destroyed the uniformity sought to be achieved by the Convention.

The questions presented to the Court are still viable because of the Senate's recent rejection of the Montreal Protocols [Additional Protocol No. 3, ICAO Doc. 9147

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[16] 49 Stat. 3014.

[17] Letter from Cordell Hull to President Franklin D. Roosevelt (March 31, 1934), *reprinted in* [1934] U.S. Av. Rep. 240, 241.

[18] *Reed* v. *Wiser*, 555 F.2d 1079, 1083 (2d Cir.) *cert. denied*, 434 U.S. 922 (1977). *Accord*, *Benjamins* v. *British European Airways*, 572 F.2d 913, 917 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977), *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Karfunkel* v. *Compagnie Nationale Air France*, 427 F. Supp. 971, 977 (S.D.N.Y. 1977).

[19] Note 10 *supra*.

(1975) and Montreal Protocol No. 4, ICAO Doc. 9148 (1975), *reprinted in* A. LOWENFELD, AVIATION LAW 985 (2d ed. Supp. 1981)], which would have amended Article 3 of the Warsaw Convention and eliminated for future cases the issues presented here. 129 CONG. REC. S2235-79 (daily ed. March 8, 1983). The present liability system under the Warsaw Convention, including Article 3(2), is, therefore, still applicable. The decision in *Lisi* and the decision below are encouraging numerous efforts to avoid the Warsaw Convention liability limits based upon the judicially created notice requirement which is incompatible with the plain language of Article 3(2).[21]

Because of their stated and unstated[22] dislike of limitations on liability for personal injury and death, the lower courts in the United States have fashioned an interpretation of a multilateral treaty that has been condemned or rejected by other parties to the Warsaw Convention considering the issue. The Court should not permit such a conflicting situation to continue and, consequently, as the final arbiter and ultimate authority on the proper interpretation of a treaty

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[20] Note 11 *supra*.

[21] *See, In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1313 n.13 (9th Cir. 1982) ("We need not decide here whether the notice required by the CAB is adequate to advise a passenger of the effect of the limitation"); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833, 836-37 (S.D.N.Y. 1982) (Discussion concerning adequacy of print size); *O'Rourke* v. *Eastern Air Lines*, 16 Av. Cas. (CCH) 18,367 (E.D.N.Y. 1982) (Adequacy of notice language and ticket delivery); *Carriage Bags, Ltd.* v. *Aerolinas Argentinas*, 521 F. Supp. 1363, 1365 (D. Colo. 1981) (language on air waybill held to be inadequate); *Moyer* v. *Port Authority of New York and New Jersey*, 16 Av. Cas. (CCH) 18,081 (E.D.N.Y. 1981) (Adequacy of notice language); *Bianchi* v. *United Air Lines*, 22 Wash. App. 81, 587 P.2d. 632 (1978) (Adequacy of print size on air waybill).

[22] *Lisi*, 370 F.2d at 515 (Moore, J. dissenting).

to which the United States is a party, this Petition should be granted. The Court may then correct the erroneous interpretation of the court below and definitively interpret the Warsaw Convention in accordance with the plain meaning of its language and consistent with the interpretation of the other parties to this multilateral treaty.

2. The decision of the court below and the *Lisi* rationale upon which it relied was wrong. The language of the Warsaw Convention is clear on its face. The court below, however, interpreted the treaty in complete disregard of its plain language. Again, in the words of Circuit Judge Moore dissenting in *Lisi*:

> Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem.

370 F.2d at 515.

Article 3(2) of the Convention, in plain, simple, concise language, imposes upon a carrier the severe and unusual penalty of absolute liability for personal injury or death of its passengers, and without limitation as to damages, "if the carrier accepts a passenger without a passenger ticket having been delivered." 49 Stat. 3015, App. 97a. This is the only circumstance listed in Article 3(2) justifying the imposition of this penalty. Nevertheless, the court below held that the penalty in Article 3(2) applies not only in cases of non-delivery, but also where the ticket delivered does not contain the Montreal Advice in the specified type size.

This holding is in direct conflict with the intent of the parties to the Warsaw Convention, as clearly expressed in Article 3, and the corollary Articles 4, 8 and 9. Article 3(1) lists the particulars to be included in the passenger

ticket. One of these is "a statement" [23] that the transportation is subject to the liability rules established by the Convention. Articles 3(1)(e), 49 Stat. 3015, App. 97a. With respect to the transportation of baggage and cargo, Articles 4(3)(h) and 8(q) specify the identical statement as one of the particulars to be included in the baggage check and air waybill, respectively. 49 Stat. 3015, 3016, App. 99a, 102a.

If the carrier "accepts a passenger without a passenger ticket having been delivered," the carrier cannot avail itself of the provisions of the Convention excluding or limiting liability. Article 3(2), 49 Stat. 3015, App. 97a. Similarly, if no baggage check is delivered, or if no air waybill is made out, the carrier cannot avail itself of the provisions of the Convention excluding or limiting liability for baggage or cargo losses. Article 4(4), 49 Stat. 3015, App. 99a; Article 9, 49 Stat. 3017, App. 102a-103a. There the similarity between the requirements for the passenger ticket and the baggage and cargo documents ends.

For, while Article 3(2), 4(4) and 9 all impose the sanction of absolute and unlimited liability in cases of nondelivery, Article 4(4) and 9 *in addition* expressly impose the sanction *if the baggage check or the air waybill fail to*

[23] The official French is "L'indication". 49 Stat. 3001, 137 L.N.T.S. 16, App. 97a. It was not intended as a notice requirement but, rather, as a "clause paramount" in keeping with other transportation conventions adopted prior to the Warsaw Convention. The landmark case of *The Hurry On (Vita Food Products* v. *Unus Shipping Co.)*, 1939 A.M.C. 257, [1939] A.C. 277, makes clear that the purpose of this kind of clause is to resolve international conflicts of law problems. A similar provision exists in the United States Carriage of Goods by Sea Act that every bill of lading "which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a *statement* that it shall have effect subject to provisions of this chapter." 46 U.S.C. §1312 (1975) (emphasis added). See, Gilmore & Black, Law of Admiralty 145 (2d ed. 1975); Knauth, Ocean Bills of Lading 157 (4th ed. 1953); Selvig, *The Paramount Clause*, 10 Am. J. of Comp. L. 205, 207-8 (1961).

contain any of the particulars required, one of which is a statement that the transportation is subject to the liability rules of the Warsaw Convention. But in the case of the passenger ticket, Article 3(2) lists only the case of non-delivery as the basis for the imposition of this sanction.

This very important distinction between the scope of the sanctions in Articles 3(2), 4(4) and 9 was recognized in *Ludecke,* 98 D.L.R.3d at 57-58, and in *Grey* v. *American Airlines, Inc.,* 95 F. Supp. 756, 758 (S.D.N.Y. 1950), *aff'd,* 227 F.2d 282 (2d Cir. 1955), *cert. denied,* 350 U.S. 989 (1956). Both the *Lisi* court and the court below ignored this critical and informative distinction reflecting the clear intent of the Convention's drafters to distinguish the circumstances under which the sanction could be imposed.

Examination of the history of the drafting of Article 3 of the Warsaw Convention confirms in unmistakable terms that the sanction in Article 3(2) does not apply merely because the passenger ticket omits any of the particulars listed in Article 3(1). The preliminary draft of Article 3 prepared by CITEJA[24] in 1928, contained the following sanction:

> If, for international carriage, the carrier accepts the traveller without having drawn up a passenger ticket, *or if the ticket does not contain the particulars indicated hereabove,* the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants.[25]

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[24] Comité International Technique d'Experts Juridiques Aériens.

[25] SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES 258 (R. Horner & D. Legrez trans. 1975) (emphasis added).

The drafting committee at the Warsaw Conference decided, however, that the words, *"or if the ticket does not contain the particulars indicated hereabove"*, be deleted. The following excerpts from the Minutes of the Conference clearly demonstrate the intent of the drafters:

> Mr. De Vos, Reporter. Sirs, the third article relates to the passenger ticket and to the particulars which must be found on the ticket.
>
> . . . .
>
> . . . But in the face of an observation of the Greek Delegate, which is as follows—The last paragraph of the article provides for sanctions in the case of the absence of this passenger ticket, *or when the passenger ticket does not contain all the particulars indicated,* consequently the sanction is too severe when it's a question of a simple omission, of the negligence of an employee of the carrier—the committee allied to this point of view and, in the last paragraph, it eliminated the words: *"or if the ticket does not contain the particulars indicated above"*.
>
> . . . .
>
> Mr. Giannini (Italy): I ask the Reporter to give us the article such as it is now prepared now [sic].
>
> Mr. De Vos, Reporter: It's the same text as the draft; there is only . . . at the last paragraph, elimination of *"or if the ticket does not contain the particulars indicated above"*.[26]

As finally adopted by the delegates, therefore, the sanction in Article 3(2) is expressly limited to the situation

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[26] *Supra* note 25, at 148-50 (emphasis added).

where no passenger ticket is delivered. The decision of the court below clearly conflicts with that intent.[27]

Two of the most respected authorities on the Warsaw Convention have reached the same conclusion. Dr. D. Goedhuis, who was President of the International Conference which adopted the Hague Protocol amending the Warsaw Convention, stated in his earlier book on the Convention:

> Hitherto, we have only considered the sanction with regard to the baggage check. With regard to the pas-

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[27] Reliance by the court below on the *Lisi* rationale that Article 3 of the unamended Warsaw Convention requires "notice" before the liability limit is available has placed the United States Government in the position of having sought and obtained wholly unnecessary amendments to Article 3 in 1955. See, 1 INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, at 124, 128, 134 (1956). At the Hague Conference in 1955 which was convened to consider several proposed amendments to the Warsaw Convention, the United States sought and achieved an amendment to Article 3(1) to require that there be included in the passenger ticket:

> a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss or damage to baggage.

2 INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, at 2 (1956).

Article 3(2) was also amended, again upon the basis of a proposal by the United States, to read as follows:

> Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

2 INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, at 3 (1956). The official French text of Article 3 of the Hague Protocol and its requirement for "un avis" contrasts sharply with "L'indication" in Article 3(1)(e) of the unamended Warsaw Convention. *Compare* App. 104a *with* App. 97a.

> senger ticket, the sanction has even less value. As it has already been said, the carrier, by virtue of the Warsaw Convention, will be deprived of the benefits of the Convention, if he fails to deliver a ticket, but he will not be deprived of them if he has delivered a ticket which is however not in conformity with the provisions of sub-paragraph 1 of article 3 regarding the form of the ticket. Consequently, he can deliver any kind of ticket, without including any of the particulars required by the Warsaw Convention, since the Convention has not provided for any sanction against such omissions.

D. Goedhuis, National Airlegislations and the Warsaw Convention 156-57 (1937). Likewise, Professor H. Drion, a delegate from the Netherlands to the Conference at The Hague reached the same conclusion.

> Both the wording of Article 3(2), when compared with that of Articles 4(4) and 9, and the history of the provision make it abundantly clear that the framers of the Convention meant to impose the sanction with respect to the ticket only in case of a complete failure to deliver a ticket, and did not want to attach the sanction to the omission of the prescribed particulars. This raises the question of which condition should be fulfilled for a slip of paper to become a ticket, the delivery of which will be sufficient for the purpose of Article 3(2). It is believed that any document will do which shows itself to be 'a ticket' for the transportation concerned.

H. Drion, Limitation of Liabilities in International Air Law 300 (1954). See also *Grey* v. *American Airlines, Inc.*, *supra*.

There should be no question, therefore, that the *Lisi* rationale upon which the court below relied is erroneous. No notice at all is required under the law as embodied in the Warsaw Convention before an airline can invoke the applicable limitation of liability as long as a ticket is delivered, which LOT did do.

3. The private inter-carrier Montreal Agreement could not and did not in any way modify the requirements of Article 3(2) with respect to the circumstance under which the sanction of absolute and unlimited liability without fault is imposed upon an airline. In pertinent part, the Montreal Agreement provides:

> Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope: . . . .

App. 73a. There is no sanction specified at all for any violation of any part of the Montreal Agreement, including the print-size requirement. Because no provision for any sanction exists in the Montreal Agreement and because none of its language purports to amend[23] Article 3(2) of the Warsaw Convention and change the only circumstance under which the sanction of absolute and unlimited liability without fault is imposed, the decision of the court below

[23] As a private agreement among air carriers, the Montreal Agreement could not, in any event, alter the language of a treaty among nations.

imposing the treaty sanction is without foundation and illogical.[29] A *treaty* sanction in the Warsaw Convention cannot be imposed for a technical "irregularity" with respect to a private agreement among air carriers.

Moreover, there is no indication in the history of the adoption of the Montreal Agreement that any particular significance was attached to the 10 point modern type requirement. The only mention of it in the history leading up to adoption of the Agreement is that "On May 4 details of the arrangement (including a notice to each passenger in quite large type) were worked out in an all day negotiating and drafting session in Montreal."[30] The "quite large type" referred to is the 10 point modern type specification ultimately adopted in the Montreal Agreement and previously used by the CAB in a regulation it proposed and promulgated approximately three years before the Montreal Agreement was adopted.[31]

Although the CAB regulation promulgated 3 years earlier was the genesis of the specification, the 10 point modern type-size specification in the Montreal Agreement was adopted independently of, but concurrently timewise with, *Lisi*. Other than this fortuitous circumstance of timing,

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[29] The decision below is unclear but appears to have found some kind of incorporation of the private Montreal Agreement print-size requirement into the Article 3(1)(e) legal requirement for a statement. For the reasons previously stated, *supra* at 16 to 21, the Article 3(1)(e) "statement" requirement is irrelevant to a determination of when the Article 3(2) sanction is imposed and incorporation of the Montreal Agreement print-size requirement into Article 3(1)(e) cannot, therefore, alter the clear intent of Article 3(2) to impose the sanction solely for failure to deliver a ticket. What is clear from the decision below is a determination to avoid the limitation of liability regardless of the law or logic. See also ***Franklin Mint, supra.***

[30] Lowenfeld & Mendelsohn, *supra*, 80 HARV. L. REV. at 594.

[31] 28 Fed. Reg. 3282, 11777 (1963), App. 79a-80a, 95a.

there is no foundation for linking the technical and non-prejudicial failure to comply with the Montreal Agreement type-size specification, an "irregularity" at best, and the Article 3(2) sanction of unlimited and absolute liability without fault for failure to deliver a ticket. The Montreal Agreement could not and did not add to, modify or otherwise affect Article 3(2) of the Convention and, therefore, Article 3(2) of the Convention cannot provide the basis for the imposition of any sanction upon LOT for a technical "irregularity" with the Montreal Agreement.[32]

The court below, nevertheless, improperly equated delivery of the LOT ticket, containing an "irregularity", with non-delivery of a ticket under Article 3(2) because of its reliance on the incorrect interpretation of Article 3(2) in *Lisi*. This conclusion was clearly incorrect because there is no relation, historical or otherwise, between Article 3(2) and the Montreal Agreement type-size specification. Moreover, the decision below is at odds with the

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[32] The Government of Canada previously rejected any notion that the Montreal Agreement or the CAB regulation could affect Article 3(2) and the circumstances under which its sanction could be imposed. Brief for Canada as *Amicus Curiae* at 9 n.5, 13, *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, *supra*. The Government of Canada prophesized with disdain what has happened here and said:

> If the decision below [*Lisi*], and the reasoning upon which it is based, is not reversed, the signatories to the [Montreal] Agreement, having waived any defenses they otherwise might have had under Article 20(1) of the Convention, would find themselves faced with uncertainty as to their limitation of liability which would be dependent upon a showing of "adequate notice" of the Convention was contained on the ticket. The result would be absolute but limited liability (up to $75,000) by reason of the the [Montreal] Agreement but potential absolute and unlimited liability were the notice deemed by any court to be "inadequate".

Id. at 13-14.

plain language of the Warsaw Convention and the intention of the Convention's drafters and can find no support in either the language of the Montreal Agreement or the negotiations leading to adoption of that Agreement.

The decision and holding of the court below result in "judicial treaty-making".[33] The court below deviated so egregiously from the normal limits of treaty interpretation that the Court should exercise its supervisory powers over the Court of Appeals and grant this Petition for a Writ of Certiorari to correct the error below.

[33] *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d at 515 (Moore, J. dissenting).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 6, 1983

Certificate of Service

I hereby certify that I have, this 6th day of July, 1983 served the foregoing petition for a writ of certiorari upon respondents by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Speiser & Krause and Kreindler & Kreindler, counsel of record for respondents, at their respective post office addresses, 200 Park Avenue, New York, New York 10017 and 99 Park Avenue, New York, New York 10016.

July 6, 1983

/s/ GEORGE N. TOMPKINS, JR.

George N. Tompkins, Jr.
Counsel for Petitioner

APPENDIX

Table of Contents to Appendix

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 729—August Term, 1982

(Argued January 18, 1983 Decided April 8, 1983)

Docket No. 82-7616

IN RE AIR CRASH DISASTER AT WARSAW, POLAND, ON MARCH 14, 1980, MDL 441, POLSKIE LINIE LOTNICZE (LOT POLISH AIRLINES), A CORPORATION.

ANGELA Y. ROBLES, MARGARET OJEDA, HENRYKA SMIEGEL, JOSE PIMENTAL, EMILY BLAND, RAYMOND E. WESSON, PATRICIA ANN CHAVIS, SUSAN JANICE RADISON, JOHN LINDSAY,

Appellees,

—v.—

LOT POLISH AIRLINES,

Appellant.

Before:

OAKES, KEARSE, and SLOVITER,*

Circuit Judges.

Appeal pursuant to 28 U.S.C. § 1292(b) from an order of the United States District Court for the Eastern District

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

of New York, Charles P. Sifton, Judge, granting partial summary judgment for plaintiffs and holding that the defendant air carrier was not entitled to invoke a liability limitation or a defense in an action brought for deaths resulting from an air crash. Affirmed.

GEORGE N. TOMPKINS, JR., Condon & Forsyth, New York, NY (Lawrence Mentz, Desmond T. Barry, Jr., Peter A. Axelrod of counsel), *for Appellant Polskie Linie Lotnicze.*

MARC S. MOLLER, Kreindler & Kreindler, New York, NY (Michael D. Young, of counsel), *for Appellees Robles and Ojeda.*

FRANK H. GRANITO, JR., Spieser [sic] & Krause, P.C., New York, NY (Rudolph V. Pino, Jr., of counsel), *for Appellees Smiegel, Pimental, Bland, Wesson, Chavis, Radison, and Lindsay.*

OAKES, *Circuit Judge*:

The Warsaw Convention[1] limits the liability of air carriers for the injury or death of international passengers. The Convention was modified in certain respects by the Montreal Agreement, which specifies that passengers must be advised of the carrier's liability limitations in 10-point type. The United States District Court for the Eastern

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[1] 49 Stat. 3000, TS No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. § 1502 (1976). The Warsaw Convention is formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air. Hereinafter, citations to the Warsaw Convention will be to its Articles.

District of New York, Charles P. Sifton, Judge, held that the use of 8.5-point rather than 10-point type to inform passengers of liability limitations stripped the appellant air carrier in this case of the protection of such limitations and prevented it from raising defenses under Article 20(1) of the Warsaw Convention. *See In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982). We affirm.

Background

On March 14, 1980 an Ilyushin 62-M aircraft owned and operated by the appellant Polskie Linie Lotnicze (LOT Polish Airlines) (hereinafter LOT) crashed while on its final landing approach in Warsaw, Poland. The appellees are survivors of American passengers who, with one exception, boarded the flight in New York.[2] Eight of the nine decedents were affiliated with the United States Amateur Athletic Union Boxing Team and were en route to Warsaw for a tournament; the ninth decedent was the wife of the team physician. LOT concedes that the 8.5-point type "Advice to International Air Passengers on Limitations of Liability" (Advice) printed on the decedents' tickets violated the Montreal Agreement, as well as a Federal Aviation Regulation (FAR) predating the Agreement, 14 C.F.R.

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[2] The various actions arising out of the crash were consolidated and transferred to the Eastern District of New York by the Joint Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. This interlocutory appeal was certified pursuant to 28 U.S.C. § 1292(b). This opinion reaches only the certified issues. We do not treat any questions pertaining to passengers like Coach Robles who flew to New York with tickets in appropriate form and apparently giving adequate notice before boarding LOT. *See Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982).

§ 221.175(a).[3] Both the Agreement and the FAR require the use of at least 10-point type; the difference between 8.5 and 10-point type, we are told by LOT, is 15/270ths of an inch, based on 72 type points to the inch. However

[3] 14 C.F.R. § 221.175(a) (1982), adopted in 1963, *see* 28 Fed. Reg. 11,777 (1963), provides in pertinent part:

> Special notice of limited liability for death or injury under the Warsaw Convention.
>
> (a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:
>
> ADVICE TO INTERNATIONAL PASSENGERS OF LIMITATIONS OF LIABILITY
>
> Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.
>
> Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.
>
> *Provided, however,* That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on: (1) Each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope . . . .

minimal a 1.5-point difference in type size might seem, we conclude that it is enough to justify Judge Sifton's holding that the appellees in this case are not subject to the liability limitation established by the Montreal Agreement. Nevertheless, LOT is bound by its waiver under the Agreement of a defense that would otherwise be available to it under the Warsaw Convention. A brief review of the history surrounding the Convention and the Montreal Agreement is necessary to understand both LOT's arguments on appeal and our reasons for rejecting those arguments.

The Convention was drafted in Warsaw, Poland, in 1929 and became effective in February of 1933. The United States was not one of the original parties to the Convention, but it announced its intention to adhere to it in late 1934. After Senate approval and Presidential proclamation, the Convention assumed the status of a treaty, "equal in stature and force to the domestic laws of the United States." *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971). Article 17 of the Convention[4] established a presumption of carrier liability for injuries or death sustained on the aircraft but Article 22(1) limited that liability to 125,000 francs.[5] Although a carrier could avoid liability by

[4] Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[5] Article 22(1) provides:

> In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of

showing that it took "all necessary measures to avoid the damage, or that it was impossible . . . to take such measures" —the so-called "all necessary measures" defense of Article 20(1)[6]—the practical effect of Article 17 was to shift the burden of proof from the passenger to the carrier. Article 17 and Article 22(1) are thus complementary, framing the trade-off embodied in the Convention. Article 3 rounds out the scheme by requiring carriers to furnish passengers with tickets stating that the transportation is subject to rules relating to liability established by the Convention.[7]

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the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

The franc refers to the French gold or "Poincare" franc, defined as 65.5 milligrams of gold at a standard fineness of 900/1000ths. *Id.*, Art. 22(4). *See Franklin Mint Corp.* v. *Trans World Airlines, Inc.*, 690 F.2d 303, 305 (2d Cir. 1982).

[6] Article 20(1) provides:

> The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

"Wilful misconduct" or equivalent conduct on the part of the carrier under Article 25 removes exclusions and limits of liability under Warsaw. That provision is not involved on this appeal.

[7] Article 3 provides:

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;

Not surprisingly, consensus as to the need for a uniform law governing air carrier liability and a passenger-carrier compromise along the lines of that effected by Article 17 and Article 22(1) did not extend to the specific monetary limitations of Article 22. Almost immediately after the Convention went into effect, several of its provisions were criticized; the "underlying and recurring theme of all the discussions was whether the limit of liability had been set at the right level." *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 504 (1967) [hereinafter cited as 80 Harv. L. Rev.]. In 1955, at an international conference at The Hague, Netherlands, the liability limitation was doubled to 250,000 francs and what came to be known as the Hague Protocol was drafted. *Id.* at 509. American delegates, however, were not satisfied with either the principle of limited liability or the notice provided by the standard form used by the airlines, *id.* at 512-514, and sought to have the warning made both more specific and more conspicuous. The Hague Protocol's amendment of the Convention's Article 3 notice provision arguably allowed each country to establish its own notice requirements, *id.* at 514, and in fact in 1963 the Civil Aeronautics Board (CAB) issued a regulation requiring foreign and domestic air carriers to furnish a clear statement of li-

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(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

ability limitations with each ticket in at least 10-point type. *See* note 2 *supra.*

The Hague Protocol was never approved by the United States, largely because of dissatisfaction with the liability limitation. Over time, opposition to the Convention and the Hague Protocol developed into a pressure for formal denunciation of the Convention by the United States. On November 15, 1965, the United States filed a Notice of Denunciation. 80 Harv. L. Rev. at 551. But the State Department indicated its willingness to withdraw the Notice before it would become effective six months later, if it appeared likely that an international agreement addressing American concerns could be reached. *Id.* at 551-52. Despite the threat of denunciation, delegates to the Montreal Conference held in February of 1966 failed to agree on a proposal satisfactory to the United States. Just prior to the effective date of the Denunciation, however, members of the International Air Transport Association agreed to an interim arrangement called the Montreal Agreement. The Denunciation Notice was withdrawn two days before it was to become effective, and the CAB simultaneously announced its approval of the Agreement. *Id.* at 586-96.

The Montreal Agreement is by its very terms a "special contract" under Article 22(1) of the Convention, which provides that a carrier and passenger "may agree to a higher limit of liability."[8] Thus, although it is actually a private agreement among carriers, it effectively modifies the Convention, at least with respect to flights departing

[8] Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, summarizing Agreement CAB 18,900, *reprinted at* 49 U.S.C. § 1502. *See* Order E-23,680, Docket No. 17,325 (CAB, May 13, 1966), *reprinted at* 31 Fed. Reg. 7302 (1966).

from, arriving, or stopping over in the United States. Carriers participating in the Agreement waive the Article 20(1) "all necessary measures" defense that would otherwise be available under the Warsaw Convention, and so the Agreement imposes essentially strict liability. Carriers signing the Agreement stipulated that they would

> at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above [the Montreal Agreement], a notice in 10 point type advising international passengers of the limitations of liability.[9]

In return for waiving the Article 20(1) defense and complying with the notice requirement set forth above, carriers receive the benefit of a liability limitation of $75,000 in most cases.

DISCUSSION

Appellant LOT's contentions may now be understood. LOT's primary argument is that the use of 8.5- rather than 10-point type was merely a "technical and wholly insubstantial" violation of the Montreal Agreement. LOT argues that, as printed, the tickets in this case complied with the intent and purpose of the Agreement because they provided adequate notice to the decedents. In spite of the fact that the Montreal Agreement was an eleventh-hour affair that narrowly averted American denunciation of the Warsaw Convention, and in spite of the CAB regulation that preceded and surely served as the model for the 10-point requirement in the Agreement, LOT maintains that the specification of 10-point type is of no

[9] *Id.*

"particular significance." Brief at 22. Thus LOT maintains that the district court erred in concluding that the effect of failing to comply with the Montreal Agreement's type size requirement subjected LOT to unlimited liability, which is the lot of a carrier who "accepts a passenger without a passenger ticket having been delivered." Article 3(2). LOT's second contention is that if it is deprived of the liability limitation established under the Montreal Agreement, the entire Agreement is somehow inapplicable. Under this argument, LOT's waiver of the Article 20(1) defense under the Agreement would be deemed void, and the appellees would be entitled, at most, to the presumption of carrier liability established by Article 17 of the Convention. We reject both of these arguments.

A. *Adequacy of notice.* LOT of course concedes that the 8.5-point type size it used violated the Montreal Agreement as well as the CAB regulation. Nevertheless, it relies on a line of cases decided by this and other circuits construing the ticket delivery requirement of Article 3(2) of the Warsaw Convention, *see* note 7 *supra*, to support its argument that if the type size provided "adequate notice," it is still entitled to limited liability. In *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S. Ct. 38, 15 L.Ed.2d 64 (1965), we held that the Convention contemplated delivery "in such a manner as to afford [passengers] a reasonable opportunity to take measures to protect . . . against the limitation of liability." *See also Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494, 498 (9th Cir. 1965) (following *Mertens*). One year after *Mertens* was decided, in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455, 88 S. Ct. 1193, 20 L.Ed.2d 27, *reh'g denied*, 391 U.S. 929, 88 S. Ct. 1801, 20 L.Ed.2d 671 (1968), we held that in order

to satisfy Article 3(2)'s delivery requirement a carrier had to provide passengers with tickets containing a notice of liability limitation in a print size that was readable because otherwise the purpose of the delivery requirement of *Mertens* and *Warren* would be defeated. *Lisi* held a 4-point notice inadequate as a matter of law; LOT points to decisions subsequent to *Lisi* holding that notices printed in type sizes smaller than that at issue here provide adequate notice for Article 3(2) purposes. *See, e.g., Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 12 Av. Cas. 17,191 (Que. C.S. 1971) (4.5-point type), *aff'd in part on other grounds and rev'd in part*, 53 D.L.R.3d 636 (Que. C.A. 1974), *aff'd on other grounds*, 98 D.L.R.3d 52 (Can. 1979); *Millikin Trust Co.* v. *Iberia Lineas Aereas De Espana, S.A.*, 11 Av. Cas. 17,331 (N.Y. Sup. Ct. 1969) (8-point type), *aff'd without opinion*, 36 A.D.2d 582, 317 N.Y.S.2d 734 (N.Y. App. Div. 1971).

Whatever merit LOT's argument might have were we considering the adequacy of notice solely under the Warsaw Convention, the fact remains that we are not. Under the Convention, the carrier must deliver a ticket containing, inter alia, a statement referring to the liability rules. Article 3(1)(e). Under the modfiying terms of the Montreal Agreement, however, that statement must be in 10-point type. *Compare Husserl* v. *Swiss Air Transport Co.*, 351 F. Supp. 702, 706-07 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (per curiam) (looking to Montreal Agreement to determine whether hijacking was within Convention's definition of "accident"). It is simply not persuasive to argue, as LOT does, that the 10-point type requirement can be read out of the Agreement as long as 8.5-point type provides what seems to this court to be "adequate notice"; equally unavailing is the argument that 10-point type would have made little or no practical dif-

ference. It is enough that the adequacy of notice was one of the concerns that led to the filing of the Notice of Denunciation, *see* 80 Harv. L. Rev. at 512-14, and that the Montreal Agreement specifically addressed this concern by requiring "notice to each passenger in large type." *Id.* at 594. Withdrawal of the Denunciation and the CAB's acceptance of the Montreal Agreement indicates a judgment by at least the executive branch that 10-point type was necessary to provide sufficient notice, and we see no reason to dispute that determination.[10]

We also note that acceptance of the Agreement is a condition precedent to the issuance of a Foreign Air Carrier Permit under § 402 of the Federal Aviation Act, 49 U.S.C. § 1372 (1976 & Supp. IV 1980); 14 C.F.R. Part 211 app. 10(h)[1] (1982). LOT acceded to the Agreement and was issued a permit accordingly. Surely it cannot now be heard to say that it should not be bound by the 10-point type size requirement. The specification of type size is as important as the requirement of delivery for Article 3(2) purposes, and LOT's failure to comply with this requirement prevents it from taking advantage of any liability limitation that it would otherwise enjoy.

LOT argues at some length in its reply brief that violation of the Montreal Agreement should not result in what it characterizes as a "treaty sanction," but this ignores the historical and functional relationship of the

[10] The 10-point guideline is a clear one, and quite easy to follow. To be sure, any such line-drawing has an arbitrary air, but LOT is a party to the line drawn and it seems to us less arbitrary to accept the 10-point standard than it would be to guess on a case-by-case basis at what constitutes "adequate notice." *See Travelers Indemnity Co.* v. *Kammer*, 72 A.D.2d 817, 421 N.Y.S.2d 898 (App. Div. 1979) (requiring strict compliance with state statute mandating use of 12-point type in insurance cancellation notices), *aff'd*, 51 N.Y.2d 792, 412 N.E.2d 1323, 433 N.Y.S.2d 98 (1980).

Agreement to the Convention. The Agreement supplements the Convention in particular respects, but Article 3(2) still imposes on carriers the duty to inform passengers of liability limitations. Failure to do so, as measured either by the terms of Article 3 or the Montreal Agreement, results in forfeiture of the limitation.[11]

Another variation on the theme that the Montreal Agreement and the Convention should be construed without reference to each other is LOT's argument that the Agreement was merely an intercarrier agreement with respect to which passengers were not intended third party beneficiaries or that, even if they were, they cannot seek a remedy not available to a contracting party.[12] This argument is sophistic.

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[11] LOT argues in its reply brief that the "fallacy" of reading the Montreal Agreement or CAB notice specification into Article 3(2) of the Convention is demonstrated by the fact that *Lisi* indicated that notice had to be on the ticket itself, while there is nothing in the Montreal Agreement or the FAR regulation that would require this. *Compare* Article 3(2) ("deliver a passenger ticket which shall contain . . . statement . . . relating to liability") *with* Montreal Agreement ("at time of delivery of the tickets, furnish to each passenger . . . a notice in 10 point type advising . . . of the limitations of liability"). FAR 221.175(a) has, however, for 20 years provided guidance that the statement must be printed on the ticket, or on a paper attached to the ticket or placed in the ticket envelope, or on the ticket envelope. Insofar as *Lisi* spoke of notice being on the ticket itself, it was referring only to the requirements of the Warsaw Convention, not those of the Montreal Agreement or the FAR. And if the required type size is too large to permit printing of the notice on the ticket itself, there is nothing to prevent carriers from using larger ticket stock.

[12] The argument that "contracting airlines would not seek unlimited and absolute liability without fault as a remedy for a breach of the Montreal Agreement by LOT," Brief at 24, so that the passengers cannot stand in any different shoes, borders on the absurd. Restatement (Second) of Contracts § 309 (1981), relied upon by LOT on this point, does not support the proposition that

Surely the United States, when it induced the air carriers to enter the Montreal Agreement by filing the Notice of Denunciation, was not acting on its own behalf. Surely the CAB's own 10-point type size requirement and its approval of the Montreal Agreement were aimed only at the public interest. Just as certainly the purpose of the 10-point type size requirement was to give passengers " 'adequate notice' of the applicable liability limits in legible form and in understandable terms," as LOT's own brief somewhat inconsistenly concedes. Brief at 22. Passengers were clearly the intended beneficiaries of a contract which specified, inter alia, the notice carriers had to provide if they were to receive the benefit of a limitation of liability. On this point we adopt Judge Sifton's discussion of the authorities and his conclusion. *See* 535 F. Supp. at 836.

B. *Waiver of Article 20(1) defense.* We also reject LOT's argument that if it is to be subject to unlimited liability under Article 3(2) of the Convention by dint of its failure to comply with the notice requirements of the Montreal Agreement, the appellees should be deprived of LOT's waiver of the Convention's Article 20(1) defense under the Agreement. LOT contends that it is "clearly inappropriate to render ineffective the limitation of liability for a technical . . . defect . . . and still subject the carrier to absolute liability without fault." Brief at 36.

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a third party beneficiary is not entitled to seek a remedy unavailable to a contracting party.

The argument that "technical violation of a regulation does not give rise to a quasi-implied private right of action" to the passengers, Brief at 24 n.12, relying on *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571, 99 S. Ct. 2479, 2486, 61 L.Ed.2d 82 (1979), totally misses the point. A right of action is not what is involved in the type size provision; plaintiffs already have that. What is involved is whether Warsaw-modified-by-Montreal limitations of liability or Warsaw Article 20 defenses to that right are available.

LOT's argument is essentially one of symmetry. We are not convinced, however, that whatever burden LOT must shoulder as a result of violating the Montreal Agreement should be "balanced" by requiring the appellees to surrender some advantage they enjoy under the Agreement. We question whether, as a practical matter, LOT's position would be much improved if it were allowed to assert the Article 20(1) defense given the presumption of carrier liability under Article 17, but we would in any event resolve doubts on this score against LOT. We do so primarily because LOT alone is responsible for its failure to comply with the clear requirements of the Montreal Agreement and the CAB regulation regarding type size. Allowing LOT to shirk its duty under the Agreement and end up in no worse a position than it would be in if it had merely violated the Convention would be to ignore the fact that if the Agreement had never been drafted there would in all probability be no Convention today. *See* discussion *supra*.

Additionally, it is not clear to us that depriving LOT of liability limitations while affording the appellees the advantage of the liability rule established under the Agreement is as disruptive of the Agreement's scheme as LOT claims. To be sure, it deprives LOT of the primary benefit of the Montreal Agreement bargain, but it is not as if the appellees are receiving something for nothing. They were, after all, still subject to the other provisions of the Convention, whether or not those provisions happened to redound to LOT's benefit in this case. The history surrounding the Montreal Agreement suggests that liability without fault was the price carriers had to pay for continued international adherence to the Convention. There is no apparent reason that passengers should be deprived of this advantage because a carrier, through its failure to comply

with the notice provisions, deprives itself of the benefits of limited liability.

LOT may not invoke the liability limitation of the Montreal Agreement nor the Article 20(1) defense of the Warsaw Convention.

The order for partial summary judgment is hereby affirmed.

Opinion of District Court

UNITED STATES DISTRICT COURT

E. D. New York

Feb. 10, 1982.

In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980.

Nos. CV-80-1290, CV-80-1408, CV-80-1665, CV-80-2977, CV-80-1291, CV-80-1473, CV-80-2511 and CV-81-0741. MDL No. 441.

Claimants suing on behalf of decedents killed in airplane crash filed motion for partial summary judgment with regard to Polish airline's defense asserting that its liability was limited to an aggregate sum not in excess of $75,000. The District Court, Sifton, J., held that: (1) use by airline of "8.5 point" rather than "10 point" type in advising international passengers on their tickets of newly applicable limitation of liability, which use constituted breach of Montreal Agreement, was not merely technical or insubstantial so as to excuse airline's breach of contract, and therefore limitation of liability was inapplicable; (2) airline was not entitled to assert defenses under article of Warsaw Convention to claims in excess of the $75,000 limitation of liability; (3) under article of Warsaw Convention providing that in the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum 125,000 francs, and defining the French franc as consisting of 65½ milligrams of gold, the calculation is appropriately made in terms of the last official price of gold; and (4) claimants could not maintain a separate wrongful death action for damages under California law.

Ordered accordingly.

Speiser & Krause, P.C. by Frank Granito, New York City, for plaintiff.

Condon & Forsyth by George N. Tompkins, New York City (Desmond T. Barry, Jr., Lawrence Mentz, Katherine B. Posner and Peter A. Axelrod, New York City, on the brief), for defendant.

MEMORANDUM AND ORDER

SIFTON, District Judge.

I

INTRODUCTION

All of the above cases arise out of the crash of an aircraft owned and operated by defendant, Polskie Linie Lotnicze ("LOT"), in Warsaw, Poland, on March 14, 1980, which resulted in the deaths of all persons on board, including a group of young American boxers. On April 14, 1981, plaintiffs in *Angela Y. Robles et al.* v. *Polskie Linie Lotnicze*, CV-80-2977, filed a motion for partial summary judgment in their favor with regard to defendant's sixth affirmative defense which asserted that its liability is limited, "in accordance with the provisions of the Warsaw Convention, defendant LOT's conditions of carriage and tariffs, and defendant LOT's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of $75,000." The plaintiffs asserted four arguments:

(1) that the decedents were not given unequivocal notice by LOT that damage recoveries would be limited since the notice in the LOT ticket stock stated only that "the Warsaw Convention *may* be applicable" (emphasis supplied),

in violation of Article 3's requirement that the carrier must deliver to each international passenger a ticket which contains "a statement that the transportation *is* subject to rules relating to liability established by this convention" (emphasis supplied);

(2) that the controlling damage limitation is that set forth in the Warsaw Convention, calculated by reference to the free market value of gold, since the limitation so calculated is greater than the $75,000 liability limitation set forth in the Montreal Agreement and since Article 23 of the Warsaw Convention prohibits agreements providing for limitations of liability lower than those proscribed by Article 22(1);

(3) that damages under the Warsaw Convention may be recovered in actual gold; and

(4) that the Warsaw Convention and the Montreal Agreement are contracts between the airlines and the passengers and plaintiffs are not bound by the liability limitations set forth in them but may sue under applicable state law.

After plaintiffs had filed and served their initial motion, they received from defendant a blank LOT ticket stock which is stipulated to be identical to the one allegedly delivered to plaintiffs' decedent, Yrenio Roman Robles, Jr. a/k/a Junior Robles. On the basis of this new factual information, plaintiffs in the *Robles* case asked for partial summary judgment in their favor with regard to the limitation of liability defense on the following ground: The LOT ticket stock contains the "Advice to International Passengers on Limitation of Liability" ("notice") required by the Warsaw Convention, the Montreal Agreement (also referred to herein as "CAB Agreement No. 18900"), and

LOT's conditions of carriage and tariff filed with the CAB pursuant to the Montreal Agreement; however, that notice does not conform with the requirements of those agreements because it is printed in type which is smaller than the "10 point modern type" required under the Montreal Agreement in order for the limitation of liability to be effective. As a result, plaintiffs argue, defendant is not entitled to any limitation of its liability.

On August 3, 1981, asserting only the type size argument, plaintiffs in the seven other above mentioned actions filed a separate motion for partial summary judgment dismissing LOT's affirmative defense based on the limitation of liability provisions of the Montreal Agreement and seeking to impose absolute liability for damages resulting from the deaths of plaintiffs' decedents. The basis for this additional request for relief is plaintiffs' argument that defendant remains bound by its waiver of defenses to liability in the Warsaw Convention even though it fails to qualify for limitation of its liability, as a result of its delivery of a defective notice.

Because it is my conclusion that, as to the plaintiffs who are suing as a result of the death of LOT ticket holders, the type size is dispositive of the motions to strike defendant's affirmative defense of limitation of liability, I do not address the lack of unequivocal notice argument raised in the April 14, 1981 *Robles* motion. I will, however, deal with the other three arguments raised by the plaintiffs in *Robles,* since they appear of significance in other cases arising out of the same air crash and part of this multidistrict litigation involving passengers who were not LOT ticket holders.

II

Discussion

It is undisputed that the passenger ticket pursuant to which plaintiffs' decedents were traveling provided for "international transportation" within the meaning of Article 1(2) of the Warsaw Convention. Since it is also undisputed that the Peoples' Republic of Poland and the United States are both High Contracting Parties to the Warsaw Convention, the Convention unquestionably applies to these actions and governs the rights of the parties herein.

It is also common ground that the Montreal Agreement, which modified certain terms of the Convention relating to limitation of liability, was entered into in 1966 by foreign air carriers, including defendant LOT. There is also no dispute that the agreement was drafted with the participation of the Department of State, the CAB, and the private International Air Transport Association and served as the basis for the United States' wtihdrawal of its notices of denunciation of the Warsaw Convention because of the Convention's low liability limitations. *See Reed* v. *Wiser*, 555 F.2d 1079, 1087 (2d Cir.), *cert. denied*, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977).

The Type Size Argument

As evidenced by its terms, the signatories to the Montreal Agreement agreed (1) to file a tariff with the CAB providing for a "special contract" pursuant to Article 22(1) of the Convention between themselves and their passengers in which they would agree to increase the limit of their liability to $75,000 and to waive their defenses under

Article 20(1) of the Convention[1]; and (2) to include within their tickets "a notice in 10 point modern type" [2] advising international passengers of the newly applicable limitation of liability.

There is no question that the Montreal Agreement was intended to inure to the benefit of American passengers and their heirs at law. These persons are, accordingly, if not persons in whose favor a cause of action was created by international agreement, *see Benjamin* v. *British World Airways*, 572 F.2d 913 (2d Cir. 1978), third-party beneficiaries of the Montreal Agreement entitled to enforce its terms. *See Owens* v. *Haas*, 601 F.2d 1242, 1250 (2d Cir. 1979); *Port Chester Electrical Construction Corp.* v. *Atlas*, 40 N.Y.2d 652, 655, 389 N.Y.S.2d 327, 330, 357 N.E.2d 983, 985 (1976); *Lawrence* v. *Fox*, 20 N.Y. 268 (1959); *Goodman-Marks Associates, Inc.* v. *Westbury Post Associates*, 70 A.D.2d 145, 420 N.Y.S.2d 26, 28-29 (2d Dep't 1979). *See also, Solmo* v. *Rosenberg*, 31 Misc.2d 911, 221 N.Y.S.2d 56, 57-58 (Sup.Ct. Nassau Co. 1961).[3]

It is also clear that defendant's use of 8.5 point, rather than the specified 10 point, type constitutes a breach of that contract. Defendant argues, however, (1) that its

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[1] Article 20(1) states that "[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

[2] It is not disputed that the term "10 point modern type" has a technical, readily ascertainable meaning or that it was intended that the term be given that meaning in interpreting the Agreement. 10-point type contains 7.2 lines of type per inch; and, while "modern type" describes a variety of type faces, the United States Government has a definition for that term which is used by the CAB and is presumably intended to be used here. In all events, it is the type size and not the type face which is at issue in this case.

[3] And see generally, 16 Am.Jur. pp. 55-85 (1978); 17 Am.Jur.2d §§ 302-19 (1964).

breach was "purely technical," (2) that the 8.5 point type substantially complies with the purpose of the 10 point type requirement, which, as expressed in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455, 88 S.Ct. 1193, 20 L.Ed.2d 27 (1968), is to give passengers adequate notice of the applicability of the Convention in order to afford them a reasonable opportunity to take self-protective measures, and (3) that the only penalty for failure to comply is a civil penalty of $1,000, pursuant to 42 U.S.C. §§ 1374 and 1471, for failure to comply with LOT's tariffs on file with the CAB.[4]

Article 3 of the Warsaw Convention requires that the passenger ticket contain a "statement that the transporta-

[4] Defendant argues in the *Robles* case that, even assuming the notice provided on its ticket was inadequate, that deficiency was cured since plaintiffs' decedent was issued a ticket stock by American Airlines in San Diego, California, covering his flight to New York, which fully conformed to the requirements of the Montreal Agreement, and thereby received adequate notice of the applicability of liability limitations. This argument is unpersuasive. The language of the Warsaw Convention as well as that of the Montreal Agreement is clear: Each international carrier bears the burden of delivery of notice to its own passengers. Defendant's reliance on the First Department's decision in *Manion* v. *Pan American Airways, Inc.*, 80 A.D.2d 303, 439 N.Y.S.2d 6 (1st Dep't 1981), is misplaced. The *Manion* court found that Pan Am's delivery of notice to its passenger in Rome during a stop-over in travel between New York and Saudi Arabia before she boarded the plane on which she was injured, was adequate under *Lisi* to limit Pan Am's liability for the injury. Here, defendant seeks to limit its liability despite its own failure to comply with the delivery requirements by relying on notice in a ticket provided by a different carrier, relating to a flight which did not leave the boundaries of the United States. There is no reason to think in this case that the delivery of this ticket was adequate to give notice to Robles that he should purchase insurance or decide not to board the LOT flight because of the information contained in the American Airlines ticket. *Cf. Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A., supra.*

tion is subject to the rules relating to liability established by this convention" and that "if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." This language has been interpreted to require that in order for the carrier to limit its liability pursuant to Article 3 the ticket delivered to a passenger must adequately notify him of the applicability of the Warsaw Convention and must be delivered to him "in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability," for example, by purchasing insurance or deciding not to board the plane. *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A., supra,* 370 F.2d at 512; *accord, Mertens* v. *Flying Tiger Line, Inc.,* 341 F.2d 851, 856 (2d Cir.), *cert. denied,* 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed.2d 64 (1965); *Warren* v. *Flying Tiger Line, Inc.,* 234 F.Supp. 223 (S.D.Cal. 1964), *rev'd,* 352 F.2d 494 (9th Cir. 1965). In *Lisi,* which involved a ticket issued before the effective date of the Montreal Agreement, the Second Circuit stated that, because the "arbitrary limitations on liability" contained in the Convention are advantageous to the carrier, "the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket . . . which give[s] him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash is limited very substantially." 370 F.2d at 512-13. The court held that the "exceedingly small" or "Lilliputian print," at issue in that case (apparently in 4 point type) was inadequate as a matter of law. *Id.* at 513-14. The court also noted that as early as 1963 the CAB had issued a regulation at 14 C.F.R. § 221.175 which provided that the notice of limitation of liability was to be printed in type "at

least as large as ten point modern type." 370 F.2d at 514 n.10.

The court in *Lisi*, however, did not specify the size of type that it would consider to be adequate. Moreover, several cases following *Lisi* held that notices printed in 8 point type, *see Millikin Trust Co.* v. *Iberia Lineas Aereas De Espana, S.A.*, 11 Av.Cas. 17,331 (Sup.Ct. N.Y. Co. 1969), *aff'd*, 36 A.D.2d 582, 317 N.Y.S.2d 734 (1st Dep't 1971), and even 4½ point type, *see Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 53 D.L.R.3d 636 (Que. C.A. 1971), *aff'd on other grounds*, 98 D.L.R.3d 52 (Can. S.Ct. 1979), satisfied the requirements of Article 3 of the Warsaw Convention.

These cases do not, however, take into acount the language of the Montreal Agreement which deals explicitly with the size of the type required for adequate notice. As noted the Montreal Agreement represents a contract between the signatories by which the air carriers agreed to offer their passengers "special contracts" increasing the limitation on liability set forth in the Warsaw Convention in return for the withdrawal by the United States of its denunciation of the Convention. *See In re Air Crash in Bali, Indonesia*, 462 F.Supp. 1114, 1123-24 (C.D.Cal.1978); *Reed* v. *Wiser, supra*, 555 F.2d 1087; *Husserl* v. *Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702, 704 n.1 (S.D.N.Y. 1972), *quoting* L. Kreindler, 1 *Aviation Accident Law*, Ct. 12, § 12A.02 at 3 (1975). The United States repudiated the Warsaw Convention out of its desire to safeguard and protect American citizens who travel overseas, and it sought through the Montreal Agreement to raise the Convention's liability limitation and otherwise improve the posture of the passenger *vis á vis* the carriers as a condition for withdrawal of its repudiation. *See* Lowenfeld, *Aviation Law* § 5.31 at 7-129 (2d ed. 1981); Lowenfeld &

Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv.L.Rev. 497, 546-52, 586-96 (1967). As part of the agreement, the parties adopted the terms of the CAB regulation § 221.175 and agreed that notice be printed in 10 point modern type. LOT now argues, in effect, that its failure to deliver a ticket which complies with this provision is excused by the doctrine of substantial performance.

Although there is authority for the proposition that the doctrine of substantial performance applies to contracts of transportation, 3A *Corbin on Contracts* § 701 (1960 ed.), it bears noting that the contract with which we are dealing is not the contract of transportation itself, but rather the Montreal Agreement. The importance of the distinction becomes meaningful in the context of Corbin's analysis of the substantial performance doctrine in terms of the purposes of the particular contract said to have been substantially performed: "Extremely important factors in solving the present problem are 1 the character of the performance that the [party claiming substantial performance] promised to render, 2 the purposes and ends that it was expected to serve in behalf of the [promisee] and 3 the extent to which nonperformance by the [promissor] has defeated those purposes and ends, or would defeat them if the errors and omissions are not corrected." *Id.* at § 706.

Here, the character of the performance promised, notice in a specified type size, itself suggests that strict compliance was intended by the parties to the Montreal Agreement. But it is because of the purposes of that agreement and the degree to which they would be frustrated if the argument were permitted that I conclude that LOT's defense of substantial performance must be rejected.

The purpose of the Montreal Agreement (as distinguished from the purpose of the "special contracts" be-

tween carriers and passengers entered into pursuant to it), like the purpose of the Warsaw Convention it preserved, was to regulate by uniform terms the conditions on which the United States would continue to adhere to the Warsaw Convention and on which the air carriers would heretofore deal with their customers. *See Reed v. Wiser, supra,* 555 F.2d at 1090-91. Thus, while the purpose of the contract evidenced by the passenger ticket was to provide international air transportation and to give "adequate" notice of the carrier's limitations on its absolute liability, the purpose of the Montreal Agreement was to secure a uniform standard as to what constituted adequate notice subject to easy administration and rapid determination of the parties' rights. *Id.* Given such a quasi-legislative purpose it may be doubted whether the doctrine of substantial performance has any application at all to a contract such as this one. If the doctrine does apply, it is clear that permitting not one, but eight ticket stocks on a single flight to deviate from the requirements of the Agreement on the grounds of substantial performance would severely undercut, if not entirely frustrate, the uniformity and precision sought to be gained. In the circumstances, LOT's failure to abide by the terms of the Montreal Agreement with regard to type size, to which it has further bound itself through its tariff filed with the CAB, can hardly be called technical or insubstantial. Moreover, since the requirement derives from its contractual obligations in the Montreal Agreement, LOT's argument that the only consequence of the breach is that it should be fined under applicable CAB regulations for failure to comply with the terms of its tariff must be rejected.

This reasoning similarly compels rejection of defendant's final argument that, in the event that the limitation of

liability provision of the Montreal Agreement is determined to be inapplicable by virtue of the type size of the tickets, the air carrier is entitled to assert its defenses under Article 20(1) of the Warsaw Convention. Defendant contends that the two provisions are inseparable because the carriers' preservation of their Article 20(1) defenses for claims in excess of $75,000 was the *quid pro quo* for their agreement to increase absolute liability to that amount. *See Lowenfeld & Mendelsohn, supra,* 80 Harv.L.Rev. at 587, 599-601. [sic] Plaintiffs argue that the effect of defendant's breach of the notice provisions of the Montreal Agreement is not a return to the Article 20(1) defenses, but rather application of the relevant provisions of the underlying Convention which the Agreement modifies, specifically that part of Article 3(2) which precludes assertion of defenses limiting or excluding liability in the absence of delivery of a ticket meeting the requirements of the Convention.

The defendant in essence seeks rescission of the Montreal Agreement as a result of its unilateral breach. However, well settled principles of contract law provide that rescission can be obtained only by the non-breaching party. *See Lipsky* v. *Commonwealth United Corp.,* 551 F.2d 887 (2d Cir. 1976); *Nolan* v. *Sam Fox Publishing Co., Inc.,* 499 F.2d 1394 (2d Cir. 1974). Since the Montreal Agreement was clearly intended to operate within the framework and incorporate all the relevant provisions of the Convention, *Lowenfeld & Mendelsohn, supra,* 80 Harv.L.Rev. at 597, the defendant's breach of the provisions of the Montreal Agreement with respect to the delivery of a conforming ticket has the same effect as non-delivery of a conforming ticket as set forth in Article 3(2) of the Convention. Accordingly, I conclude that defendant is not entitled to assert its defenses under Article 20(1) of the Convention as to

those claimants suing on behalf of decedents to whom the defendant failed to deliver a ticket meeting the type size requirements of the Montreal Agreement.

THE GOLD STANDARD ARGUMENT

Were it not for this determination, however, defendant's liability would be limited to the $75,000 per passenger amount set forth in the Montreal Agreement, in the absence of some factual or legal argument not presented on these motions, as none of the plaintiffs' remaining arguments on the present motions prove convincing. The first of plaintiffs' arguments involves the method by which the Warsaw Convention damage limitation should be calculated. Article 22(1) of the Warsaw Convention provides that "[i]n the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs." The "franc" is specifically defined as follows: "The sum . . . shall be deemed to refer to the French franc as consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency." Article 22(4). Plaintiffs here assert that the basis for the calculation converting this limitation into United States dollars should be the free market price of gold.[5] The defendant argues that, on the contrary, the conversion should be based on either the exchange value of the current French franc or the Special Drawing Right ("SDR") used by

[5] Based on the April 1981 $510-per-ounce value of gold, the damage limitation permitted by Article 22 of the Convention would have to be greater than $120,000. With the fair market value of gold now under $400 per ounce, the maximum permissible limitation would still appear to be in excess of $75,000. Since Article 23 prohibits agreements that provide liability limitations lower than those prescribed in Article 22, the Montreal Agreement, with its $75,000 limit, would be too low.

members of the International Monetary Fund as a unit of account. A fourth possible basis for the conversion calculation exists in the last official price of gold in the United States which, while it was championed by neither side in this litigation, was the value upon which Judge Knapp settled when he considered this problem in *Franklin Mint Corp.* v. *Trans World Airlines, Inc.*, 525 F.Supp. 1288 (S.D.N.Y.1981). I conclude that this latter basis is the one on which the conversion should be premised.

Plaintiffs' position that the market value of gold should determine the value of the Warsaw Convention liability limitation is, according to plaintiffs, supported by decisions by courts in Canada, Greece, Argentina, and Sweden and by legal commentators. Plaintiffs also contend that public policy mandates that the limit be tied to the fair market value of gold, first, because previous modifications in the interpretation of the damage limitations demonstrate that the United States never thought the limtations were immutable, but rather, had to respond to inflation which now can only be insured by use of the fair market price; second, because the United States has demonstrated an aversion to low liability limitations and an interest in maximum recovery for injured parties or their survivors, as evidenced, e.g., by its refusal to adhere to the Hague Protocol and its contribution to the Guatemala Protocol; and, third, because the United States has evinced support for the operation of free market forces in the aviation industry, as evidenced by recent steps toward deregulation. For purposes of computing liability under the Convention, plaintiffs assert, it is of no significance that international currencies are no longer tied to gold, since gold does have a readily determinable value in the market place and is easily traded.

In addition to offering support for their position, plaintiffs enumerate several reasons why they believe the other three possibilities put forward are untenable. The last official price of gold—the $42.22 figure set by Congress in the Par Modification Act, Pub.L. No. 93–110, 87 Stat. 352 (1973), and adopted by the Civil Aeronautics Board in a 1974 order that converted the Warsaw Convention "gold francs" into dollars at that price—has been, they argue, explicitly rejected by Congress when it abolished the "official" price in 1976, effective in 1978. Par Modification Act, Pub.L. No. 94–564, 90 Stat. 2660 (1976). Plaintiffs further argue that the language and the history of the Warsaw Convention do not support calculating the Article 22 damage limitation by reference to an "artificial" gold value, since the intention of those who wrote the treaty was that the damage limitations have a uniform value throughout the world and that no one nation have the unilaterial power to fix the conversion rate. Finally, plaintiffs note that, although the CAB has stated that it is taking no official position in the gold controversy, a CAB official, in a March 1980 internal memorandum, expressed the view that changes in the applicable laws have removed the legal basis for using the $42.22 conversion figure. (Internal Memorandum of Civil Aeornautics Board written by Patricia Kennedy, p.3, dated March 18, 1980.)

Plaintiffs' opposition to basing the calculation on the current paper franc of France, one of the units suggested by the defendant, is simply that the history and development of the Warsaw Convention gold clause require rejection of any reliance upon paper money. As plaintiffs note, in the inflationary period of the Convention's origin the franc was considered an "imaginary unit of account" (Reply Memorandum of Points and Authorities in Oppo-

sition to LOT Arguments to Plaintiffs' Motion for Summary Judgment and Alternatively to Strike the Warsaw Convention-Montreal Agreement Defenses, p.12), significant only in that it was the link to the real monetary unit, gold, which was adopted to achieve a uniform method by which the damage limitation could be calculated by all the contracting parties without being tied to a fluctuating national currency. Adopting the paper-franc standard would, according to plaintiffs, violate fundamental principles of treaty interpretation, since it would require the court to read Article 22(4) out of the Convention and substitute its own method of calculating the damage limitation.

Although the plaintiffs fail to address the final option —the SDR—expressly, it is clear from the arguments that they advance that they do not support basing the calculation of damages upon this unit either. They would undoubtedly argue, as they have done explicitly in reference to the current franc, that courts may not annul or disregard provisions of a treaty upon any notion of equity, general convenience or even substantial justice, which is in fact what the Court would be doing were it to read Article 22(4) out of the Convention and substitute an alternative method, based on the SDR, of calculating the liability limit.

The defendant LOT disputes plaintiffs' contention that the fair market value of gold is the proper basis for the liability limitation calculation and suggests that the Court refer to either the current French franc or the SDR, the international monetary standard that has, according to LOT, replaced gold as an international standard of value.

Defendant's position is based primarily on its views of the changing international monetary system. At the time of the Warsaw Convention, according to defendant, gold

formed the basis for the international monetary system and was the means through which currencies were converted. Similarly, in 1955, when the Hague Protocol was adopted, and in 1971, when the Guatemala Protocol was adopted, gold continued to play an important function as a common monetary denominator, a function that was given official status by the International Monetary Fund, created by the Bretton Woods Conference in 1944. Because of this role, it made sense at the time that all these treaties were drafted, according to defendant, to specify the liability limitation in terms of a unit of account tied to a specified weight of gold with a certain fineness, since it was easy to convert that unit to determine what the liability limitation was in terms of each carrier's domestic currency. Now, however defendant argues, gold no longer plays any role in the international monetary system, but is instead merely a commodity permitted to fluctuate without official intervention or concern for its role as a common monetary denominator. As of 1978, defendant contends, the Standard Drawing Right has been substituted for gold as the standard unit of account and common denominator for exchange arrangements. Accordingly, either the SDR or the French franc, rather than gold, is appropriately used as the measure of compliance with the Warsaw Convention's requirements.

In terms of the intent of the Convention's drafters, defendant argues that use of the fair market value of gold would contravene one of the primary purposes of the Convention, that of providing a uniform, definite limit of liability for the carriers. *See Reed* v. *Wiser, supra,* 555 F.2d at 1079. According to the defendant, in place of a precise, internationally controlled figure for airline liability, agreeable to nations with varying standards of living,

would be the uncontrolled variations of an international commodities market.[6]

As further support for the rejection of a standard based upon the fair market value of gold, defendant cites the Legal Committee of the International Civil Aviation Organization, which prepared the draft of the Montreal Protocols that was adopted at the International Conference on Air Law in Montreal in 1975. The Legal Committee adopted a resolution, with which the United States delegate to that committee agreed, specifically stating that, because of the change in the character of the market for gold since adoption of the Warsaw Convention, conversion of the Convention's limitation on liability in terms of Poincaré francs into national currencies other than gold "should not be made on the basis of the price of gold on the free market for that metal." [7] (Summary Report of the ICAO Legal Committee, Doc. 9122, L/C 172, 25/10/74.)

Accordingly, defendant argues that it no longer makes sense to base the liability limitations on the value of gold and that a unit that has some current monetary significance—either the French france [sic] or the SDR—should be substituted.

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[6] As an example, defendant refers to the Guatemala Protocol, which was signed by the United States but never ratified. That Protocol revised the limits of the Warsaw Convention to an equivalent value of $100,000, based upon the then "official" price of gold. In April 1981, if the fair market price of gold were used, the limit set forth in the Protocol would be approximately $1,400,000 (based upon a $490 per ounce price of gold), and certainly, defendant asserts, no one intended that.

[7] Plaintiffs dispute the significance of the Legal Committee's resolution since at the time of the resolution there were two prices of gold in effect, an official one and a fair market one. Now, since there is no longer an official price, plaintiffs contend that reliance on the resolution is misplaced.

The suggestion that receives the most attention by LOT is the one that utilizes the current French franc as the unit for the purposes of calculating the Convention's liability limitation. The merit of this argument is that it does not depart entirely from the language of the Convention. Moreover, defendant states that "[e]very court considering the question [presented here] since gold became just a commodity traded on the speculative market has found that the francs specified in Article 22 of the Warsaw Convention must be taken to refer to the current French franc." In support of this statement, however, defendant cites only a 1980 district court opinion, *Kinney Shoe Corp.* v. *Alitalia Airlines*, 15 Av.L.Rep. 18,509 (S.D. N.Y.1980), and a 1980 French case, *Chamie* v. *Egyptair*, Judgment of January 31, 1980, Cour d'appel, Paris [1980] D.S.Jur. ——. Judge Haight, in *Kinney Shoe Corp., supra*, made the conversion, but without comment as to why he relied upon the current French franc. In *Chamie, supra*, however, the court stated that:

> "the French franc of today, heir of the 1926 Poincaré franc, with a gold weight identical to the Warsaw franc, to the old franc, then to the New franc of 1960, defined by a gold weight after the 1969 devaluation, having lost since April 1978 all reference to a gold value and being accepted as legal tender for international debts, [the present French franc] is the only one to be used for the conversion of Warsaw francs into national currency and must be accepted as having a value identical to the 1926 French franc on the international scene but without a reference to gold."

Defendant also refers in this connection to the legislative history of the Convention to support its conclusion,

stating that the insistence by the delegates at the Convention upon the gold standard was an insistence based upon the *monetary* aspect of gold and that now, with gold no longer playing a monetary function, it is only logical to revert to francs themselves to determine the appropriate liability limitation. Against this argument must, however, be weighed the consideration, recognized elsewhere by LOT, that the parties to the Warsaw Convention deliberately sought to avoid the dangers inherent in placing the definition of the limitation of liability within the control of any single country.

Alternatively, defendant suggests that Poincaré francs could be converted into SDRs, which, it asserts, are the modern-day equivalent of gold as the monetary standard internationally, and then into dollars. Defendant argues that there is support for this approach in the United States' proposal to the Legal Committee of the International Civil Aviation Organization for the Montreal Protocols to amend the Warsaw Convention. In that proposal the United States suggested substituting SDRs for French francs; and, because of the widespread use of the SDR as a unit of account, its use was adopted in the Protocols and Article 22 rewritten to reflect the substitution. The Montreal Protocols are still pending adoption, however; and the Warsaw Convention has not been amended to reflect the substitution of SDRs for gold.

Considering all of the arguments put forth by the parties, I conclude that neither party has championed the result that seems to me to make the most sense under the circumstances. In short, I conclude that, in determining whether limitation of liability clauses expressed in terms of United States dollars comply with the Warsaw Convention's provisions on the maximum permissible limita-

tion of liability, the calculation is appropriately made in terms of the last official price of gold, $42.22 per ounce.

Defendant is correct in pointing out that, at the time of the various conventions and protocols, gold formed the basis for the international monetary system and that it was because of gold's function that all of the treaties were drafted to specify the liability limitation in terms of a unit of account tied to a weight of gold with a certain fineness. *See, e.g., Asser, Golden Limitations of Liability in International Transport Conventions and the Currency Dispute,* 5 J.Mar.L. & Com. 645, 663 (1974). See also the recorded comments of the Swiss Representative, Mr. Pittard, at the Warsaw Convention, cited in plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment to Strike the Warsaw Convention Defense. The signatories of the treaties looked to gold to avoid fluctuations in the limitations, since gold had a constant value and the currencies of the various nations were subject to unilateral alterations for reasons wholly unrelated to air carriers' liability. This constancy and stability, upon which the parties to the treaties relied, cannot be achieved if the fair market value of gold is used for the calculations. To substitute the fluctuating price of the commodity gold for the relatively fixed and certain price of an international monetary unit does, as defendant suggests, directly contravene the intentions of all those who adopted the treaties. For this reason, such a substitution is clearly inappropriate, and plaintiffs' suggestion that the fair market value of gold be the basis for the conversion must be rejected.[8]

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[8] As far as I am aware, aside from Judge Knapp's decision in *Franklin Mint Corp., supra,* there has been only one other United States court that has considered this question. That court, the United States District Court of Texas, Southern District, con-

Nevertheless, it would be a mistake to conclude from the fact that gold no longer plays a role in the international monetary system that all references to gold in the Convention may be ignored in calculating the liability limitation and a new measure substituted, whether the current French franc or the SDR.[9] The Warsaw Convention's damage clauses are, in fact, drafted in terms of gold, and they have not as yet been amended to strike that reference. Both the drafting and redrafting of treaties is the business of branches of this government other than the judiciary. Unless and until the damage clauses are redrafted—no matter how logical it may seem to base the calculations upon the French franc, the SDR or any other currency or unit of account—the judiciary does not have the authority to, as plaintiffs correctly state, "read Article 22(4) out of the Convention and *substitute* an *alternative* method of calculating the damage limit." (Emphasis in original.) Courts are not authorized to annul or disregard

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cluded that the proper basis for determining the liability limitation is with reference to the free market price of gold. *Boehringer Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981). It did so in spite of its findings that the drafters of the Warsaw Convention used gold as the unit of reference because of its stability and that "to the present day, during the time in which the free-market price of gold has risen to more than $400 an ounce, the CAB has allowed the airlines to calculate their limitation of liability under the Warsaw Convention based on the artificial, non-existent figure of $42.22 an ounce," the CAB being the "government agency most intimately concerned with the transaction at hand" and its interpretation "[coming] as close as anything to constituting a governmental interpretation of the Article 22 limitation." *Franklin Mint Corp., supra.* I must respectfully disagree with the Texas court's conclusion for the reasons set forth herein.

[9] As noted *supra*, resort to the current French franc would have the additional drawback of ignoring the desire of the treaty drafters to put it beyond the power of any one country to modify the impact of the Convention.

provisions of a treaty upon their own notions of equity, general convenience or even substantial justice, *King Features Syndicate* v. *Valley Broadcasting Co.*, 43 F.Supp. 137 (N.D. Tex.), *aff'd*, 133 F.2d 127 (5th Cir. 1942), since an annulment or disregard would constitute a modification of the treaty, and treaty modifications are solely within the province of the Senate.

There remains to consider the propriety of using the last official United States price of gold to determine whether the $75,000 limitation of liability provisions set forth in the tickets for these flights were lower than permitted by the Warsaw Convention. The clear merit of using this price as the unit for conversion is that the price constitutes a conversion factor established by precisely the kind of mechanism that the Convention's drafters contemplated when the applicable clauses were drafted. The use of the last official United States price for gold means the use of a conversion factor chosen by the United States at the time the price was set to determine the relationship of this country's currency and those of all other nations using a similar standard for conversion. Such a conversion factor, grounded in the policy of this country with respect to the value of its currency *vis à vis* all other currencies based upon the gold standard, has a stability which would be entirely lost if the unit of conversion were subject to the fluctuations of a private commodities market relatively untouched by the regulating influence of any public policy. At the same time, adoption of a conversion factor keyed to a generally employed international unit of value employs a common denominator of such far-reaching significance for the country that its alteration for any but the most pressing reasons of public policy is not to be foreseen.

To be sure, tying the operation of a dynamic clause of the Warsaw Convention, meant to deal with a changing global economy without the need for constant amendment, to the public policy of the United States, as expressed in its official price of gold at one moment in time, runs the risk under some circumstances of itself undermining the intention of the Convention's drafters. But there is no reason to think that there have been such changes in the world's monetary system between the time the last United States gold price was fixed and now that application of the last official price of gold would substantially undermine the intention of the treaty drafters.[10] Moreover, the "legislative history" of the Warsaw Convention (which would appear appropriately to include the history of the Montreal Agreement) itself makes clear that the Convention has never been considered to contain mechanisms so perfectly responsive to changes in the world's economy as never to need amendment or revision by the original signatories. The present situation, in which one of the most important of the world's currencies has separated the value of its currency from the international unit of value in use at the time the Warsaw Convention was drafted, may well be one demanding a response from the world's governments. But there is no reason to suppose that the drafters of the Convention contemplated that a response to such a situation should come from the judicial branch of government of one of the signatory powers acting alone.

I find, therefore, that the conversion should continue to be based upon the last official price of gold, $42.22 per

[10] There are many complaints about the inadequacy of the Warsaw Convention damages limitation given developments in tort law, but they can hardly be laid at the doorstep of changes in the monetary system over the last ten years.

ounce and, accordingly, that the $75,000 limitations of the Montreal Agreement are not below the level provided for in the damage limitation provisions of the Warsaw Convention.

Plaintiffs' other arguments in favor of partial summary judgment must be rejected as well. Their assertion that damages under the Warsaw Convention may be recovered in actual gold is based on an unsupported and unsupportable reading of Article 22(4) of the Convention. Plaintiffs contend that the statement that "the sum . . . *may* be converted into any national currency" (emphasis added) means that conversion is optional with the person seeking to recover damages and "that a claimant may elect to accept restitution or compensation by taking delivery of gold and convert it himself at such time as he wishes." Defendant correctly points out that plaintiffs' interpretation has no precedential support and in fact runs counter to settled law.

Section 452 of Title 31 of the United States Code, which has its origin at a time well prior to the Warsaw Convention, provides that "United States notes shall be lawful money, and a legal tender in payment of all debts, public and private, within the United States except for duties on imports and interest on the public debt." The constitutionality of this provision was upheld long ago, *Legal Tender Cases*, 12 Wall. 457 (1871). The Supreme Court has also held, in connection with this statute, that gold need not be tendered in the satisfaction of private obligations unless there is an express promise to pay in gold. *See, e.g., Trebilcock* v. *Wilson*, 12 Wall. 687, 20 L.Ed. 460 (1871); *Bronson* v. *Rodes*, 7 Wall. 229, 19 L.Ed. 141 (1869). By parity of reasoning, there is no cause to suppose that the drafters of the Warsaw Convention intended to depart

from settled United States law in the absence of some express provision requiring payment in gold at the option of the claimant. The use of the word "may" in the language of the Warsaw Convention is hardly to be construed as such an express agreement that damages under the Warsaw Convention at the option of the claimant are to be paid in gold.

Contrary to plaintiffs' final argument, the Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transporation, and plaintiffs cannot maintain a separate wrongful death action for damages under California law. The Warsaw Convention, a treaty of the United States and, therefore, the "supreme law of the land, equal in stature and force to the domestic laws of the United States," *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971), provides that "[t]he carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger" (Article 17) and that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention . . . without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." (Article 24) A number of authorities have agreed that the Convention was intended to act as an exclusive remedy for the recovery of damages for personal injury suffered in an international airplane accident, *see, e.g., Reed* v. *Wiser*, *supra*, and that the language of Article 24 was included specifically for the purpose of preventing the institution of independent claims outside the sphere of the Convention. H. Drion, Limitation of Lia-

bilities in International Air Law 71-72 (1954). Article 24, along with the Article 22 limitation of liability of a carrier, would have no meaning if this exclusivity argument were rejected and plaintiffs were permitted to assert independent causes of action under California law. On the contrary, the purpose of the Convention to regulate in a uniform manner the liability conditions of a carrier engaged in international transportation by air would be defeated. *See, e.g., Benjamins* v. *British European Airways,* 572 F.2d 913 (2d Cir. 1978), *cert. denied,* 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979); *Reed* v. *Wiser, supra.* The fact that the passengers' rights in this action in some sense arise out of a "special contract" between the air carrier and the deceased passengers entered into pursuant to the Montreal Agreement in no way detracts from this conclusion. The passengers' "special contracts" are of the type specifically contemplated by the Warsaw Convention as an appropriate means of increasing the liability limitations set forth in the Convention. Nothing in the authorities or common sense suggests that it was intended that, as a consequence of entering into such "special contracts" with their passengers, the airlines would be deprived of all limitations on liability to the passengers' heirs at law. Clearly, the remedy provided for by the Convention, whether expressed in terms of a cause of action arising under the treaty, *see Benjamins* v. *British European Airways, supra,* or as a cause of action to enforce rights under the special contracts for increased liability permitted by the Convention was, for the reasons set forth in *Reed* v. *Wiser, supra,* intended to be exclusive. Accordingly, plaintiffs' application to strike the limitations defense on the theory that it has its origin solely in a contract to which they are not parties must be denied.

Since this Court is of the opinion that this decision involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation within the meaning of 28 U.S.C. §1292(b), the issues decided herein with regard to defendant's affirmative defense of limitation of liability are hereby certified for interlocutory appeal.

The parties are directed to appear for a pretrial conference on March 19, 1982, at 10:00 a. m., in Courtroom No. 6, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York.

The Clerk is directed to mail a copy of the within to all parties.

So Ordered.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eight day of April, one thousand nine hundred and eighty-three.

Present:

HON. JAMES L. OAKES
HON. AMALYA L. KEARSE
HON. DOLORES KORMAN SLOVITER*
Circuit Judges.

82-7616

In re Air Crash Disaster at Warsaw, et al.,
Angela Y. Robles, Margaret Ojeda, et al.,

Appellees,

v.

LOT Polish Airlines,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

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* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

/s/ Edward J. Guardaro
by: Edward J. Guardaro,
Deputy Clerk

14 C.F.R. § 221.175 (1982)

§ 221.175 Special notice of limited liability for death or injury under the Warsaw Convention.

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATIONS OF LIABILITY

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The

statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on: (1) Each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further,* That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in the charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section: *Provided, however,* That an air carrier, except an air taxi operator subject to Part 298 of this subchapter, or foreign air carrier which provides a higher limitation of liability than that set forth in the Warsaw Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreement was approved by the Board by Order E-23680, dated May 13, 1966 (31 FR 7302, May 19, 1966), may use the alternate form of notice set forth in the proviso to § 221.176(a) of this chapter in full compliance with the posting require-

ments of this paragraph. *And provided further,* That an air taxi operator subject to Part 298 of this subchapter, which provides a higher limitation of liability than that set forth in the Warsaw Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreement was approved by the Board by Order E-23680, dated May 13, 1966 (31 FR 7302, May 19, 1966), may use the following notice in the manner prescribed above in full compliance with the posting requirements of this paragraph.

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

> Passengers traveling to or from a foreign country are advised that airline liability for death or personal injury and loss or damage to baggage may be limited by the Warsaw Convention and tariff provisions. See the notice with your ticket or contact your airline ticket office or travel agent for further information.

Such statements shall be printed in bold faced type at least one-fourth of an inch high.

(Sec. 402, 72 Stat. 757; 49 U.S.C. 1372)
[ER-708, 36 FR 22229, Nov. 23, 1971, as amended by ER-837, 39 FR 8319, Mar. 5, 1974; ER-844, 39 FR 16120, May 7, 1974]

Judgment of Supreme Court of Canada

LUDECKE v. CANADIAN PACIFIC AIRLINES LTD.

Supreme Court of Canada, Martland, Ritchie, Pigeon, Estey and McIntyre, JJ.
March 20, 1979

Aviation—Carriage of passengers—Limitation of liability of carrier—Warsaw Convention, 1929—Whether ticket must include reference to Convention—Degree of legibility required—Carriage by Air Act, R.S.C. 1970, c. C-14.

Contracts—Carriage by air—Warsaw Convention, 1929—Tickets—Whether ticket must include reference to Convention—Degree of legibility required—Carriage by Air Act, R.S.C. 1970, c. C-14.

In order to take advantage of the limitation of liability permitted by the *Warsaw Convention, 1929* (See *Carriage by Air Act*, R.S.C. 1970, c. C-14, Sch. I), the carrier must, by art. 3(2), deliver a passenger ticket. Provided that a ticket is delivered the carrier is entitled to the limitation of liability, even if the ticket omits or contains in illegible form the particulars specified in art. 3(1), namely, notice that the carriage is subject to the rules of the Convention. This result follows from art. 3(2), providing that the absence, irregularity or loss of the passenger ticket do not affect the validity of the contract of carriage or the applicability of the Convention. It is otherwise under The Hague Protocol where a "notice" is specifically required as a condition of the carriers limitation of liability. Under art. 4 of the *Warsaw Convention, 1929* dealing with baggage checks, it is similarly specifically provided that the absence of a statement referring to the Convention disentitles the carrier to the limitation of liability. A statement that is reasonably legible by the ordinary person sufficiently complies with the requirement.

Judgment of Supreme Court of Canada

[*Montreal Trust Co. et al.* v. *Canadian Pacific Airlines Ltd. et al.* (1976), 72 D.L.R. (3d) 257, [1977] 2 S.C.R. 793, 12 N.R. 408, distd; *Lisi* v. *Alitalia Linee Aeree Italiane S.p.A.* (1966), 9 Avi. 18, 120; affd 9 Avi. 18,374; affd 390 U.S. 455; *Warren* v. *Flying Tiger Line* (1964), 9 Avi. 17,621; revd 9 Avi. 17,848; *Mertens* v. *Flying Tiger Line* (1963), 9 Avi. 17,187; affd 9 Avi. 17,475, refd to]

APPEAL from a judgment of the Quebec Court of Appeal, 53 D.L.R. (3d) 636, dismissing an appeal and allowing an incidental appeal from a judgment of Challies, J., on a question of law arising out of a contract for carriage by air.

Peter R. Lack, for appellant.
W. S. Tyndale, Q.C., for respondent.

The judgment of the Court was delivered by

MCINTYRE, J.:—This is an appeal from the Court of Appeal for Quebec which allowed, in part, an appeal from the judgment of the Superior Court of that Province. The appellant, as widow of the deceased and next friend of her two infant children, sued the respondent in the Superior Court for damages resulting from the death of her husband, one G. T. Hodge, in a crash in Tokyo on March 4, 1966, of a commercial aircraft owned and operated by the respondent, who will hereafter be referred to as the "carrier". The deceased, a passenger on the aircraft, had a ticket, which also served as a baggage ticket, issued in England by a travel agent acting for British Overseas Airways Corporation. His trip commenced in London, took him to Delhi, Hong Kong and finally to Tokyo. The passage from Hong Kong to Tokyo was by the carrier on its aircraft. It was a successive carrier to British Overseas Airways Corporation within the meaning of the *Carriage*

by Air Act, 1939 (Can.), c. 12 (R.S.C. 1952, c. 45 [now R.S.C. 1970, c. C-14]), and the *Carriage by Air Act*, 1932 (U.K.), c. 36. These statutes introduced into the law of the two countries the *Warsaw Convention, 1929* [see Sch. I, R.S.C. 1970, c. C-14], an international convention governing international carriage by air. This appeal involves consideration of arts. 3 and 4 of the Convention reproduced hereunder in an English translation of the original French text:

Article 3

(1)For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) the place and date of issue;

(*b*) the place of departure and of destination;

(*c*) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercised that right, the alteration shall not have the effect of depriving the carriage of its international character;

(*d*) the name and address of the carrier or carriers;

(*e*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Neverthe-

less, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit the liability.

Article 4

(1) For the carriage of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) the baggage check shall contain the following particulars:

(*a*) the place and date of issue;

(*b*) the place of departure and of destination;

(*c*) the name and address of the carrier or carriers;

(*d*) the number of the passenger ticket;

(*e*) a statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) the number and weight of the packages;

(*g*) the amount of the value declared in accordance with Article 22(2);

(*h*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity or loss of the baggage check does not affect the existence or the validity of

> the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*) and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

The limitations of liability were provided for in art. 22 of the Convention. Liability for each passenger was, in the absence of any special contract with the carrier, fixed at a maximum of 125,000 francs and for loss of baggage 250 francs per kilogram.

The appellant advanced two claims—one based upon the death of her husband and the other upon the loss of his baggage. The carrier, while admitting liability, contended that its liability was limited in accordance with the terms of the Convention. Two questions thus arose for determination:

(1) Did the limitation of liability of the *Warsaw Convention, 1929* apply to the claim based on the death of her husband?; and

(2) Did the limitation of the Convention apply to the claim for loss of baggage?

The actual ticket issued to the deceased was destroyed in the crash. For evidentiary purposes, ex. P-2 was introduced at trial. The agreed statement of facts provided in para. 7:

> 7. THAT BOAC Passenger Ticket and Baggage Check No. 0614-0000-0000, marked "Specimen Ticket", produced herewith as Exhibit P-2, and to avail as though

> here in full reproduced, is identical as to cover, size and number of pages as well as printed material and size of print as the BOAC airline ticket that had been issued to the late Gerard T. Hodge and used by him at the times and in respect to the flights referred to above.

References to the ticket in this judgment are references to ex. P-2.

Immediately below where the name of the deceased appeared on each of the flight coupons, or pages of the ticket, reference was made to the Convention in the following terms in 4½ point type:

> If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention covers and in most cases limits the liability of carrier for death or personal injury and in respect of loss of or damage to baggage.

On each flight coupon appeared the words "issued by British Overseas Airways Corporation subject to conditions of contract inside the front cover". The words "issued by" and the words referring to the conditions of contract were in type somewhat larger than 4½ point but smaller than the type used for "British Overseas Airways Corporation". The conditions of contract were in 4½ point type and para. 2(a), as far as it is relevant for these purposes, was in the following terms:

> 2.(a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage as defined by the Convention.

Inside the back cover of the ticket, in type somewhat larger than 4½ point, appeared the following words:

> Liability of carrier in respect of baggage and other personal property is limited in respect of its declared value which shall not exceed $16.50 (U.S. currency) or its equivalent per kilogram for checked baggage and $330.00 (U.S. currency) or its equivalent per passenger for unchecked baggage, unless a higher valuation is declared in advance and additional charges are paid pursuant to carrier's tariffs.

Upon an agreed statement of facts, the essentials of which have been recited above, the parties, pursuant to art. 448 of the *Code of Civil Procedure*, 1965 (Que.), c. 80, submitted a question of law with a joint factum in these terms:

> *Question of Law:*
>
> THAT this submission relates and applies solely and exclusively to the question of law as to whether, based upon the facts hereinabove set forth and the contents of the Exhibits forming part of the said facts, the Defendant is entitled to avail itself of those provisions of the First Schedule to the Canadian and U.K. Carriage by Air Acts (Warsaw Convention) referred to above, which limit the liability of Defendant towards Plaintiff for damages claimed by the latter as a result of the crash of Defendant's aircraft at Tokyo International Airport, Tokyo, Japan, on March 4th, 1966.

To understand the judgments in the Superior Court and the Court of Appeal, it may be helpful to explain the dif-

fering views which have been expressed on the construction of art. 3 of the Convention. American Courts, dissatisfied with the harsh provisions of the Convention on the question of limitation of liability, have construed art. 3(2) to require not only the delivery of a ticket but of one which, in accordance with art. 3(1), contains in legible form a statement that the carriage is subject to the rules relating to liability established by the Convention. They have also held that delivery must allow reasonable time for examination. They have considered that delivery of a ticket not meeting such conditions amounts to no delivery and therefore the provisions of art. 3(2), depriving the carrier of the benefit of the limitation where a passenger is accepted without a ticket, would apply. Several American cases are conveniently collected and discussed by Georgette Miller in her book *Liability in International Air Transport* (1977), pp. 82-5. They include *Lisi* v. *Alitalia Linee Aeree Italiane S.p.A.*, 9 Avi. 18,120 (S.D.N.Y. 1966), affd 9 Avi. 18,374 (2nd Cir. 1966), affd 390 U.S. 455 (U.S. S.C. 1968); *Warren* v. *Flying Tiger Line*, 9 Avi. 17,621 (S.D. Cal. 1964), revd & remd, 9 Avi. 17,848 (9th Cir. 1965); *Mertens* v. *Flying Tiger Line*, 9 Avi. 17,187 (S.D.N.Y. 1963); affd & remd, 9 Avi. 17,475 (2d Cir. 1965).

Another view which appears to have been accepted in most jurisdictions outside of the United States is that Article 3 fails to provide any sanction for its breach except in a case where a passenger has been accepted with no ticket. Therefore a ticket bearing an illegible statement or no statement at all would not result in a loss of the limitation to the carrier.

The trial Judge dealt with the formal question of law by answering the two questions set out earlier. He answered the first question dealing with the death claim

"yes" thus according the limitation to the carrier. In this, it is clear that he did not apply the American test. He read art. 3 literally and adopted the view that no sanction could be applied where a ticket was delivered. He answered Q. 2 dealing with the baggage claim "no" thus denying the carrier the benefit of the limitation essentially for the reason that art. 4, unlike art. 3, contained a sanction for its breach and anything printed on the ticket purporting to be in compliance with art. 4 was so illegible as to amount to non-compliance.

The appellant appealed against the holding that the carrier was entitled to the benefit of the limitation of liability on the death claim. The carrier, by incidental appeal, sought a reversal of the holding that it was not entitled to the benefit of the limitation on the baggage claim.

The Court of Appeal, while rejecting the trial Judge's view that art. 3 contains no sanction for non-compliance, dismissed the death claim. Casey, J.A., said [53 D.L.R. (3d) 636 at p. 638]:

> This reasoning is not acceptable. The limitation contemplated by the Convention must be earned: the carrier must deliver a ticket which satisfies the mandatory requirements of art. 3(1) which article is in effect, a definition. If the ticket delivered does not satisfy these requirements it is not a ticket within the meaning of that article and the sanction of art. 3(2) will apply.
>
> However, appellant has two other hurdles: "she must establish either that the ticket does not contain "a statement that the carriage is subject to the rules relating to liability established by this Convention" or, that the statement, if there is one, is not legible.

He then went on to hold that the words printed on the ticket were legible and sufficient in content to satisfy the requirements of the Convention and he dismissed the appeal. For the same reason, he allowed the incidental appeal holding, in the result, that the carrier was entitled to the limitation of liability provided by the Convention on both death and baggage claims. In this he applied the American test.

In my opinion, the words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1(*e*) which is illegible, amounts to no delivery of ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier delivered a ticket and thus preserved its right to the limitation. For these reasons, it is my opinion that the trial Judge correctly answered Q. 1 and in so doing he properly construed art. 3. In view of the fact that the Court of Appeal reached, though for different reasons, the same conclusion, I would dismiss the appeal in respect of Q. 1.

As to the second question, the trial Judge recognized that, unlike art. 3, art. 4, which governed baggage claims, did provide a sanction. Because, in his opinion, the print was illegible on the ticket, he considered it did not contain the particulars set out in paras. *(d)*, *(f)* and *(h)* of art.

4(1). He therefore applied the sanction and denied the limitation to the carrier.

Casey, J.A., in the Court of Appeal, reversed this finding and I find myself in agreement with him on this question. An examination of the ticket satisfies me that the print was of such type and arrangement as to be legible by the ordinary person using ordinary diligence and the content of the ticket was adequate to meet the requirements of the Convention. I consider the ticket complied with art. 4 and, therefore, would dismiss the appeal on Q. 2 and accord the limitation to the carrier.

In argument in this Court, the case of *Montreal Trust Co. et al.* v. *Canadian Pacific Airlines Ltd. et al.* (1976), 72 D.L.R. (3d) 257, [1977] 2 S.C.R. 793, 12 N.R. 408, was fully discussed. Counsel for the appellant argued that it should lead to an allowance of this appeal. In my view, however, the *Montreal Trust Co.* case does not afford assistance to the appellant. It arose out of the same crash as did the case at bar. The deceased, Stampleman, had purchased an Air Canada ticket in Canada and his trip began and was to end in Canada. The present respondent was a successive carrier to Air Canada on that portion of the trip from Hong Kong to Tokyo where he perished. In that case, the *Warsaw Convention, 1929,* as modified by The Hague Protocol, Sch. II (September 28, 1955), governed the question because Canada had become a party to the Protocol through the enactment of "An Act to Amend the Carriage by Air Act", 1963 (Can.), c. 33. The same question arose in each of the Stampleman and Ludecke cases but different provisions must govern the answer.

Article 3 of The Hague Protocol provides:

Article 3

(1) In respect of the carriage of passengers a ticket shall be delivered containing:

. . . . .

(c) a *notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph (c) of this article, the carrier shall not be entitled to avail himself of the provisions of Article 22.*

(Italics added.) It will be seen that a notice is required in place of a statement and failure to comply will deprive the carrier of the benefit of the limitation under art. 22. Article 4 also uses the word "notice" instead of "statement".

Ritchie, J., speaking for the majority of this Court, said at pp. 263-4 D.L.R., p. 802 S.C.R.:

> In relation to a claim for loss of life, art. 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was "delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects and with the greatest respect I think that the Court of Appeal erred in applying the reasoning which had been used in the *Ludecke* case in interpreting the Convention to the interpretation of the Protocol in the present case.

I am of the opinion that with these words he effectively distinguished between the two cases. Whether a different result would have followed in the case at bar if The Hague Protocol had been the governing statutory provision does not arise in this case.

I would dismiss the appeal. In the circumstances of this case, I would direct that the parties pay their own costs.

Appeal dismissed.

LOT Counterpart to Agreement CAB 18900

UNITED STATES OF AMERICA
WASHINGTON, D.C.

CIVIL AERONAUTICS BOARD

CERTIFICATION

I HEREBY CERTIFY *that the annexed is a true copy of the*

Counterpart to Agreement CAB 18900 signed by Polskie Linie Lotnicze Lot (LOT Polish Airlines) and filed February 1, 1973

on file in this Board.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board to be affixed this 24th day of July one thousand nine hundred and eighty-one.

Phyllis T. Kaylor
Secretary
CIVIL AERONAUTICS BOARD

Section 204(d) of the Federal Aviation Act (49 U.S.C. 1324(d)) provides in pertinent part that "[p]ublications purporting to be published by the Board shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Board—in all courts [state, territorial, and federal]—without further proof or authentication thereof"; Section 701(e) (49 U.S.C. 1441(e)) provides "[n]o part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted in evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports"; and Section 1103 (49 U.S.C. 1503) provides that documents and reports filed with the Board shall be preserved as public records in the custody of the secretary of the Board, "shall be received as prima facie evidence of what they purport to be—in all judicial proceedings", and that "copies of, and extracts from" such records "certified by the secretary of the Board, under the seal of the Board, shall be received in evidence with like effect as the originals."

LOT Counterpart to Agreement CAB 18[illegible]0

Montreal
May 4th, 1966

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government

"The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at the Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Artickle [sic] 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding or other bodily injury of a passenger".

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type in ink contrasting with the stock on (i) each ticket; (ii) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts

of carriage embodied in applicable tariffs provide that the liability of LOT Polish Airlines and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier, for [sic] such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative".

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

LOT Counterpart to Agreement CAB 18900

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

LOT POLISH AIRLINES

/s/ Zbigniew Stabeusz
Zbigniew Stabeusz
General Manager
North America

New York, January, 1973

31 Fed. Reg. 7302 (1966)

[Docket No. 17325; Order No. E-23680]

LIABILITY LIMITATIONS OF WARSAW CONVENTION AND HAGUE PROTOCOL

ORDER APPROVING AGREEMENT

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 13th day of May, 1966.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over 90 countries likewise became parties to the Convention.[1] On November 15, 1965, the U.S. Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon 6 months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers, and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims

[1] The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement (Agreement CAB 18900) between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's economic regulations and assigned the above-designated CAB number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage

which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the U.S. Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein.

The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States. The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The U.S. Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958 and particularly sections 102, 204(a) and 412 thereof:

It is ordered, That: 1. Agreement CAB 18900 is approved.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.

[SEAL] HAROLD R. SANDERSON,
Secretary.

[F.R. Doc. 66-5494; Filed, May 18, 1966 8:49 a.m.]

Agreement CAB 18900

CAB Form 263
(Rev. 1-76)

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"Advice to International Passenger on Limitation of Liability

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the

Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of [certain]*
[(name of carrier) and certain other] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

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* Either alternative may be used.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any Carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

.....

.....

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28 Fed. Reg. 3281 (1963)

CIVIL AERONAUTICS BOARD

[14 CFR Part 221]

[Economic Regs. Docket 14411; EDR-52]

PART 221—CONSTRUCTION, PUBLICATION, FILING AND POSTING OF TARIFFS OF AIR CARRIERS AND OF FOREIGN AIR CARRIERS

Proposed Limitation of Liability for Death or Injury of Passengers Under Warsaw Convention

APRIL 1, 1963.

Notice is hereby given that the Civil Aeronautics Board has under consideration a proposed amendment to Part 221 of the Economic Regulations which would provide for improved notice of limitation of liability for death or injury of passengers under the Warsaw Convention.

The principal features of the proposed amendments are recited in the explanatory statement and the proposed amendments to Part 221 are set forth in the proposed rule. This regulation is proposed under authority of sections 204(a), 401(e), 403, and 411 of The Federal Aviation Act of 1958, as amended (72 Stat. 743, 754, 758, and 769; 49 U.S.C. 1324, 1371, 1373, and 1381).

Interested persons may participate in the proposed rule making through submission of ten (10) copies of written data, views or arguments pertaining thereto, addressed to the Docket Section, Civil Aeronautics Board, Washington 25, D.C. All relevant matter in communications received on or before May 20, 1963, will be considered by the Board before taking final action on the proposed rule. Copies of

such communications will be available for examination by interested persons in the Docket Section of the Board, Room 711, Universal Building, 1825 Connecticut Avenue NW., Washington, D.C., upon receipt thereof.

By the Civil Aeronautics Board.

[SEAL] HAROLD R. SANDERSON,
Secretary.

Explanatory statement. The United States is party to the Convention for the Unification of Certain Rules Relating to International Transporation by Air signed at Warsaw, October 12, 1929 (Warsaw Convention), 49 Stat. 3000. The Convention limits the legal liability of airlines to passengers and shippers in "international transportation," a term defined in Article 1 of the Convention. Most of the transportation to and from the United States and segments of international journeys performed wholly within the United States are governed by the Convention. Among other things the Convention creates a presumption of liability on the part of the carrier and limits the carrier's liability for death or injury of passengers to approximately $8,290, except in the case of willful misconduct or default deemed equivalent thereto.

The Board recently participated in a study by the Interagency Group on International Aviation initiated by the Secretary of State on the relationship of the United States to the Warsaw Convention. As a result of such study it appears to the Board that the recoveries by passengers or their survivors from U.S. carriers for injury or death in cases covered by the Warsaw Convention have been substantially less than recoveries against such carriers in cases

where the Convention does not apply. It also appears to the Board that many passengers whose journeys are covered by the Convention may not be aware of the Convention limits. This seems to be especially so in the case of passengers traveling on flights between two points in the United States which constitute the domestic portion of an international journey of such passengers. Without actual knowledge of the limitation a passenger is unable to make a proper judgment as to whether, in his particular circumstances, it would be desirable to purchase additional insurance to protect himself or his survivors in case of injury or death.

The Warsaw Convention requires that the passenger be given a ticket containing a statement that the transportation is subject to the rules relating to liability established by the Convention. The carriers comply with this requirement by a notice in small print on the face of the ticket reading as follows: "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

It appears to the Board that this notice may be inadequate in two major respects: First, the ticket is by no means the most effective instrument for advising a passenger of a limitation of liability. There can be no assurance that a passenger will read his ticket at all or if he does, that he will read it under such circumstances as will enable him to realize the significance of the notice provision and take such protective action as his circumstances require. The type in which the notice is currently printed

on the ticket is too small to alert the passengers to the importance of the matter. Second, the fact of greatest significance to the passenger, namely, the amount of the limitation on liability for death or injury does not appear in the notice.

The Board proposes herein to require an improved form of notice by the carriers of the effect of the Convention.

Carriers may, if they are so disposed, enter a special contract providing for a higher liability than the limit provided in the Convention. Such a contract could be effectuated by an appropriate tariff provision making it part of the transportation contract. The carriers' tariffs should reflect the exercise of their choice in this respect. Specifically, it is proposed to require inclusion in all tariffs of a brief statement as to the applicability and effect of the Warsaw Convention including the amount of the limit in dollars. It is proposed also to require that this provision of the tariff be called to the attention of the public by requiring a specific statement to be printed on the face of the ticket in type substantially larger than the notice presently appearing on the tickets. The proposed statement, like the present notice, is modeled after the language of Article III of the Hague Protocol of September 28, 1955, but includes, in addition, the amount of the liability limit in U.S. dollars. It is proposed also to require that the same statement appearing on the ticket be displayed on a conspicuous sign posted at each desk, station and position in the United States where tickets for international journeys are sold. The requirement of a sign would apply also to the offices of airline ticket agents in the United States.

On January 22, 1963, the member carriers of the Air Traffic Conference of America (ATC) submitted to the

Board for approval under section 412(b) of the Federal Aviation Act of 1958, a resolution effective March 22, 1963, providing for an improved form of notice of the limit of liability of the Warsaw Convention, by means of a prescribed statement on a separate sheet of paper to be placed in the ticket envelope or attached to the ticket. (Agreement No. C.A.B. 16950.) The ATC statement would read as follows:

ADVICE TO INTERNATIONAL PASSENGERS

> The United States and more than fifty other nations are parties to a treaty known as the 'Warsaw Convention', which establishes uniform rules and standardized documents for international air transportation, and certain conditions relating to liability of carriers to international passengers and shippers. When the treaty applies, it imposes a stricter rule of liability on the carrier, but recovery for death or injury may be limited to approximately $8,290. Other limits apply to baggage and cargo.
>
> Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

In support of the Resolution, ATC contends that a separate notice accompanying the ticket is superior to other means of giving notice and has positive advantages. ATC argues that its proposed form of notice is most likely to be read by all international passengers in ample time to make ap-

propriate insurance arrangements, and would involve minimum impingement upon non-international passengers.

The resolution may constitute a possible alternate, modification, or supplement to the provisions of the rule herein proposed. The Board will, therefore, withhold action on the ATC Resolution (Agreement No. CAB 16950) in order that simultaneous consideration may be given to the proposed rule, the ATC Resolution and any alternative proposals which may be advanced for the purpose of improving the notice to the public of the limits of liability under the Convention. Interested persons are invited to comment on the ATC Resolution in this Docket.

In addition, the Board is issuing an order[1] simultaneously herewith pointing out that the proposed rule, if adopted, would result in certain inconsistencies with the standard form of IATA ticket and baggage check approved by the Board under section 412(b) of the Act (Agreement No. CAB 10559-R-2, approved in Order E-11024 of February 12, 1957, 24 C.A.B. 575). Therefore, in connection with the consideration of the proposed amendment of Part 221 of the regulations, the order provides that the Board will reexamine its approval of the IATA Passenger Ticket and Baggage Check. Persons interested in such reexamination are invited to submit their views and comments for inclusion in this docket.

The Civil Aeronautics Board proposes to amend Part 221 of the Economic Regulations (14 CFR Part 221) as follows:

1. By amending § 221.4 by adding a new paragraph (bb) to read as follows:

[1] E-19447, 28 F.R.

28 Fed. Reg. 3281 (1963)

(bb) "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000.

2. By adding a new paragraph (j) to § 221.38 to read as follows:

(j) *Notice of limitation of liability for death or injury under the Warsaw Convention.* Notwithstanding the provisions of paragraph (h) of this section, each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on liability to passengers as provided in Article 22(1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added.

3. By amending § 221.171(b) to read as follows:

(b) A carrier will be deemed to have complied with the requirement that it "post" tariffs, if it maintains at each station, office, or location a file in complete form of all tariff publications required to be posted; and in the case of tariffs involving passenger fares, rules, charges or practices, notice to the passenger as required in §§ 221.174 and 221.175.

4. By amending Subpart N by adding a new section to read as follows:

28 Fed. Reg. 3281 (1963)

§ 221.175 Special notice of limited liability for death or injury under the Warsaw Convention.

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall print on the face of tickets delivered to passengers whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement:

ADVICE TO INTERNATIONAL PASSENGERS

> Passengers embarking upon a journey involving an ultimate destination or stop in a country other than the country of departure are advised that the Warsaw Convention may be applicable to their journey. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $8,290 and limits liability for loss of or damage to baggage.

Provided, however, that when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the ticket stock.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also

cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section. Such statement shall be printed in bold face type at least one-fourth of an inch high.

[F.R. Doc. 63-3533; Filed, Apr. 3, 1963; 8:52 a.m.]

28 Fed. Reg. 11775 (1963)
CAB Economic Regulation Concerning Limitation of Liability for Death or Injury of Passengers Under Warsaw Convention

Title 14—AERONAUTICS AND SPACE

Chapter II—Civil Aeronautics Board

SUBCHAPTER A—ECONOMIC REGULATIONS

[Reg. No. ER-395; Amdt. 16]

PART 221—CONSTRUCTION, PUBLICATION, FILING AND POSTING OF TARIFFS OF AIR CARRIERS AND FOREIGN AIR CARRIERS

LIMITATION OF LIABILITY FOR DEATH OR INJURY OF PASSENGERS UNDER WARSAW CONVENTION

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 31st day of October 1963.

By notice of proposed rule making issued April 1, 1963, EDR-52, Docket 14411, and published at 28 F.R. 3281, the Board advised of its intention to amend Part 221 of the Economic Regulations to require air carriers to publish information in their tariffs, print on tickets of certain passengers subject to the Warsaw Convention and post on signs at ticket counters and in ticket agents' offices a statement advising of the applicability of the Convention and the dollar amount of the carriers' limit of liability under the Convention. In the same proceeding the Board also invited comments of interested persons on an agreement effective March 22, 1963, submitted by member carriers of the Air Traffic Conference of America (ATC) for Board approval under section 412 of the Federal Aviation Act of 1958. Under the ATC agreement (Agreement No. CAB 16950) the air carriers are voluntarily to provide an improved form of notice of the limits of liability of the

Warsaw Convention in the form of a prescribed statement on a separate sheet of paper placed in the ticket envelope or attached to the ticket. In this same proceeding we also ordered a re-examination of our approval in 1957 of the standard form of IATA Passenger Ticket and Baggage Check, adopted by the carriers pursuant to Agreement No. CAB 10559 (R-2), to determine whether changes should be made therein to conform with our action in the rule making proceeding.

Comments were submitted by the air carriers through the Air Transport Association of America or individually; by certain foreign air carriers; by a representative of the National Association of Claimants' Counsel of America (NACCA); and by representatives of the Eastern and National Industrial Traffic Leagues.

Upon consideration of all the comments the Board is of the view that the public interest requires an improved notice of the applicability and effect of the Convention and especially the amount of the carrier's limit of liability. The agreement adopted and implemented by the member carriers of the Air Traffic Conference of America is a significant improvement upon the present notice on the standard IATA ticket. We believe, however, that imposition of the requirement by regulation, rather than reliance upon the ATC Agreement, is required in the public interest to assure the continued applicability of the requirement, to facilitate its enforcement by the Board, and to extend it to foreign air carriers in the United States and others not party to the ATC Agreement.

As to the manner of giving the notice, in our notice of proposed rule making we proposed that language similar to the statement now appearing on the carriers' international tickets, modified to include the dollar amount of

the Warsaw limit of liability, be printed on the ticket in at least ten point type instead of the present small type. NACCA supported the Board's proposal to print the notice on the ticket, while the air carriers and the foreign air carriers opposed printing an improved notice on the ticket. The carriers contend (1) that there is insufficient space on the standard IATA ticket to print the notice in the size type proposed by the Board; (2) that the separate piece of paper provided in the ATC resolution is a more prominent and effective means of giving the notice; (3) that the ATC method would reach only the international passengers who are likely to be covered by the Warsaw Convention and would not raise undue concern in the minds of domestic passengers to whom it does not apply; and (4) that to require the carriers serving the United States to revise their tickets either would endanger the valuable uniformity which has been achieved through the IATA standard ticket or else would require ticket agents and carriers to maintain separate ticket stocks for domestic and international passengers.

We are persuaded by certain of the considerations advanced by the carriers that to require printing the advice only on the ticket itself would not be in the public interest. A notice on a separate piece of paper, inserted in the ticket envelope, would appear to be a more effective means of attracting the attention of passengers to the liability limits of the Convention than printing the same information on the ticket. The methods suggested by the carriers would also avoid the necessity of revising the standard form IATA ticket or of requiring the carriers and their agents to maintain separate stocks of tickets for the international passengers covered by the Board regulation.

28 Fed. Reg. 11775 (1963)

However, the effectiveness of the ATC method of giving the notice is dependent upon whether the airline ticket clerk or independent travel agent remembers to insert or attach the necessary piece of paper. In the ticketing there will inevitably be some passengers who will not receive the piece of paper. Printing the notice on the ticket envelope also presents difficulties. Where a travel agent does not use that carrier's ticket envelope, adequate written notice of the Convention may not be received by the passenger until he presents his ticket to the carrier and receives one of the carrier's envelopes. On the other hand, printing the notice on the ticket would assure that in every case where the carrier is able to claim the Convention limits, a sufficiently clear notice of such limits is in fact delivered to the passenger.

In view of the advantages and disadvantages which attach to the various methods of giving written notice of the Convention, the Board will give the carriers three options under the regulation. They will be authorized to print the notice in at least ten point type: (1) on the ticket (i.e., on each ticket coupon, or elsewhere in the ticket booklet); (2) on a piece of paper either placed in the ticket envelope or attached to the ticket; or (3) on the ticket envelope. In cases where carriers elect to use (2) or (3) above, it will be necessary that they make vigorous efforts to assure that their clerks and ticket agents actually deliver the written notice to each passenger subject to the Convention. In this connection, the Board will maintain close surveillance to assure compliance and should it appear that passengers are not actually receiving the notice, prompt consideration will be given to appropriate amendment of this regulation.

28 Fed. Reg. 11775 (1963)

The question of the ratification of the Hague Protocol to the Warsaw Convention is pending in the United States Senate, and associated legislation which would require U.S. carriers to provide accident insurance to Warsaw passengers is being recommended to the Congress. While these matters are pending and so long as an acceptable alternative means of giving the notice appears available, the Board is reluctant to compel the carriers to reprint their tickets to give the improved notice.

As to the text of the Warsaw notice, our notice of proposed rule making proposed essentially to add the dollar amount of the Convention limit to the present language of the IATA standard ticket. The carriers favored the language recently adopted by ATC, and NACCA urged that the carriers be required to print on the ticket a longer and more detailed notification of the effect of the Convention, together with information as to where and when insurance should be purchased and the tax implications and other aspects of various types of insurance.

We will retain the basic form of the language set forth in our notice of proposed rule making. However, we will change the heading to make the subject matter of the notice more readily apparent and we will include language in the text to make clear that the Warsaw Convention may be applicable to the passenger's entire journey, including domestic segments. We do not adopt the first paragraph of the ATC notice which begins with a discursive and unnecessary recital of the legal relationship between carriers and passengers under the Warsaw Convention. Without regard to whether this recital is legally deficient as NACCA contends, its placement and content are such as to divert the passenger from the more impor-

tant part of the notice which is the dollar amount of the carrier's liability limit for death or injury. The language we have adopted advises the passenger of the dollar limit and other pertinent aspects of the Convention in a more intelligible form.

We will incorporate in the text of the required notice without change the second paragraph of the ATC notice relating to the availability of insurance. Such language is desirable and adequate for the purpose. Contrary to the suggestion of NACCA, we consider it unnecessary and inappropriate to require the carriers to furnish passengers an extensive explanation of the estate and tax advantages and disadvantages of various types of insurance which may be purchased.

In our notice of proposed rule making we proposed also that a notice containing the same language be posted on a conspicuous sign at each location in the United States where tickets are sold for journeys covered by the Convention. The carriers oppose this provision on grounds that it might unduly alarm domestic passengers who are not affected by the Convention. They contend also that the passenger's attention would be distracted from the sign by other signs and advertisements at the ticket counter, and that some airport authorities prohibit the posting of signs at ticket counters.

In the absence of any information or experience, the question of whether counter signs advising international passengers as to the Warsaw Convention would unduly alarm domestic passengers or injure the domestic air travel market is purely a matter of speculation. However, even if the carriers were correct, such considerations would have to give way to the more important consideration of

the passenger's right to know of the limitation of the carrier's liability to him for death or injury. A prominent sign at the ticket counter, supplemented by a written statement delivered to passengers by one of the means discussed above, constitute, in our view, the minimum means of assuring that passengers receive this important information.

The Board recognizes that other signs and advertising material at ticket counters will, to some extent, distract from the Warsaw sign. On the other hand, the presence of such material attests to the value of signs at ticket counters in communicating information to passengers. As to the carriers' contention that airport regulations at some points prohibit posting the Warsaw notice at ticket counters, section 403(a) of the Federal Aviation Act of 1958 provides that carrier tariffs be filed, posted and published in such form and manner and contain such information as the Board shall by regulation prescribe. A regulation of the Board, pursuant thereto, would clearly take precedence over a conflicting airport regulation.

NACCA supported the Board's proposal for a sign at ticket counters but in the same detailed language which they urged be included on tickets. In addition, they proposed that the notice be required on all airline advertising and schedules for Warsaw transportation. The language suggested by NACCA is rejected for reasons discussed above. In addition, the methods of promulgating the notice adopted herein are adequate and there is no need for further notification by carriers in their advertising or schedules.

These amendments to Part 221 will be made effective February 1, 1964, to permit the carriers to elect the course of action they intend to follow, amend their tariffs, in-

struct their ticket personnel and agents, and print, distribute, and post the required notices and signs.

The method of advising passengers of the Warsaw Convention prescribed herein is in many respects inconsistent with the arrangement adopted by the carriers in the ATC agreement (Agreement CAB No. 16950). Upon the taking effect of this regulation, the ATC agreement will serve no useful purpose. The public interest does not therefore require the approval of the agreement under section 412 of the Act and it will be disapproved. The re-examination of our approval of the IATA Standard Form of Ticket and Baggage Check initiated by Order E-19447 of April 1, 1963, will continue in order to give us an opportunity to observe the carriers' practices under the amendments to Part 221 promulgated herein.

In consideration of the foregoing, the Civil Aeronautics Board hereby amends Part 221 of the Economic Regulations (14 CFR Part 221), effective February 1, 1964, as follows:

1. By amending § 221.4 by adding a new paragraph (bb) to read as follows:

(bb) "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000.

2. By adding a new paragraph (j) to § 221.38 to read as follows:

(j) *Notice of limitation of liability for death or injury under the Warsaw Convention.* Notwithstanding the provisions of paragraph (h) of this section, each air carrier and foreign air carrier shall publish in its tariffs a provi-

sion stating whether it avails itself of the limitation on liability to passengers as provided in Article 22(1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability, its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention, including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added.

3. By amending § 221.171(b) to read as follows:

(b) A carrier will be deemed to have complied with the requirement that it "post" tariffs, if it maintains at each station, office, or location a file in complete form of all tariff publications required to be posted; and in the case of tariffs involving passenger fares, rules, charges or practices, notice to the passenger as required in §§ 221.174 and 221.175.

4. By amending subpart N by adding a new section to read as follows:

§ 221.175 Special notice of limited liability for death or injury under the Warsaw Convention.

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

28 Fed. Reg. 11775 (1963)

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $8,290 and limits liability for loss or damage to baggage.

Additional protection can usually be obtained by purchashing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) on the ticket envelope.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also

cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section. Such statement shall be printed in bold face type at least one fourth of an inch high.

(Sec. 204 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743; 49 U.S.C. 1324. Interpret or apply secs. 401(e), 403 and 411, 72 Stat. 754, 758 and 769; 49 U.S.C. 1371, 1373 and 1381)

Effective: February 1, 1964.

Adopted: October 31, 1963.

By the Civil Aeronautics Board:

[SEAL] HAROLD R. SANDERSON,
Secretary.

[F.R. Doc. 63-11698; Filed, Nov. 4, 1963; 8:47 a.m.]

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. 49 Stat. 3000, et seq.; T. S. 876

CHAPITRE II

TITRE DE TRANSPORT.

SECTION I.—

BILLET DE PASSAGE.

Article 3.

1. Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) Le lieu et la date de l'émission;

b) Les points de départ et de destination;

c) Les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractére international;

CHAPTER II.

DOCUMENTS OF CARRIAGE.

SECTION I.—

PASSENGER TICKET.

Article 3.

1. For the carriage of passengers the carrier delivers a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character;

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929.
49 Stat. 3000, et seq.; T. S. 876

d) Le nom et l'adresse du ou des transporteurs;

e) L'indication que le transport est soumis au régime de la responsabilité établi par le présente convention.

2. L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente convention. Toutefois, si e transporteur accepte le voyageur sans qu'il ait été délivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette convention qui excluent ou limitent sa responsabilité.

SECTION II.—
BULLETIN DE BAGAGES.

Article 4.

(1) Dans le transport de bagages, autres que les

(d) The name and address of the carrier or carriers;

(e) A statement that the carriage is subject to the rules relating to liability established by this Convention.

2. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.

SECTION II.—
LUGGAGE TICKET

Article 4

1. For the carriage of luggage, other than small

menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

(2) Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur.

(3) Il doit contenir les mentions suivantes:

a) Le lieu et la date de l'émission;

b) Les points de départ et de destination;

c) Le nom et l'adresse du ou des transporteurs;

d) Le numéro du billet de passage;

e) L'indication que la livraison des bagages est faite au porteur du bulletin;

personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

2. The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

3. The luggage ticket shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the luggage will be made to the bearer of the luggage ticket;

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. 49 Stat. 3000, et seq.; T. S. 876

f) Le nombre et le poids des colis;

g) Le montant de la valeur déclarée conformément à l'article 22 alinéa 2;

h) L'indication que le transport est soumis au régime de la responsabilité établi par le présente convention.

(4) L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence, ni la validité du contrat de transport que n'en sera pas moins soumis aux règles de la présente convention. Toutefois, si le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette convention qui exclu-

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22 (2);

(*h*) A statement that the carriage is subject to the rules relating to liability established by this Convention.

4. The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (*d*) (*f*) and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the

ent ou limitent sa responsabilité.

Convention which exclude or limit his liability.

Article 8.

La lettre de transport aérien doit contenir les mentions suivantes:

a) Le lieu où le document a été créé et la date à laquelle il a été établi;

b) Les points de départ et de destination;

c) Les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) Le nom et l'adresse de l'expéditeur;

e) Le nom et l'adresse du premier transporteur;

Article 8.

The air consignment note shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the affect of depriving the carriage of its international character;

(d) The name and address of the consignor;

(e) The name and address of the first carrier;

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929.
49 Stat. 3000, et seq.; T. S. 876

f) Le nom et l'adresse du destinataire, s'il y a lieu;

g) La nature de la marchandise;

h) Le nombre, le mode d'emballage, les marques particulières ou les numéros des colis;

i) Le poids, la quantité, le volume ou les dimensions de la marchandise;

j) L'etat apparent de la marchandise et de l'emballage;

k) Le prix du transport, s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer;

l) Si l'envoi est fait contre remboursement, le prix des marchandises et, éventuellement, le montant des frais;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of the packages, the method of packing and the particular marks or numbers upon them;

(i) The weight, the quantity and the volume or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

m) Le montant de la valeur déclarée conformément à l'article 22, alinéa 2;

n) Le nombre d'exemplaires de la lettre de transport aérien;

o) Les documents transmis au transporteur pour accompagner la lettre de transport aérien;

p) Le délai de transport et l'indication sommaire de la voie à suivre *(via)* s'ils ont été stipulés;

q) L'indication que le transport est soumis au régime de la responsabilité établi par la présente convention.

Article 9

Si le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien, ou si celle-

(m) The amount of the value declared in accordance with Article 22 (2);

(n) The number of parts of the air consignment note;

(o) The document handed to the carrier to accompany the air consignment note;

(p) The time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the carriage is subject to the rules relating to liability established by this Convention.

Article 9

If the carrier accepts goods without an air consignment note having been made out, or if the air con-

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929.
49 Stat. 3000, et seq.; T. S. 876

ci ne contient pas toutes les mentions indiquées par l'article 8 [*a*) à *i*) inclusivement et *q*)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette convention qui excluent ou limitent sa responsabilité.

signment does not contain all the particulars set out in Article 8 *(a)* to *(i)* inclusive and *(q)*, the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929. Done at The Hague, on 28 September 1955. 478 U.N.T.S. 371

Article III

À l'article 3 de la Convention—

a) l'alinéa 1er est supprimé et remplacé par la disposition suivante:

"1. Dans le transport de passagers, un billet de passage doit être délivré, contenant:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prévues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) un avis indiquant que si les passagers entreprennent un voyage comportant une destination finale

Article III

In Article 3 of the Convention—

a) paragraph 1 shall be deleted and replaced by the following:

"1. In respect of the carriage of passengers a ticket shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a

ou une escale dans un pays autre que le pays de départ, leur transport peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de mort ou de lésion corporelle, ainsi qu'en cas de perte ou d'avarie des bagages."

country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

b) l'alinéa 2 est supprimé et remplacé par la disposition suivante:

b) paragraph 2 shall be deleted and replaced by the following:

"2. Le Billet de passage fait foi, jusqu'à preuve contraire, de la conclusion et des conditions du contrat de transport. L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois, si, du consentement du transporteur, le passager s'embarque sans qu'un billet de passage ait été dé-

"2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier the passenger embarks without

livré, ou si le billet ne comporte pas l'avis prescrit à l'alinéa 1 *c*) du présent article, le transporteur n'aura pas le droit de se prévaloir des dispositions de l'article 22."

a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 *c*) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22."

Article IV

Article IV

À l'article 4 de la Convention—

In Article 4 of the Convention—

a) les alinéas 1, 2 et 3 sont supprimés et remplacés par la disposition suivante:

a) paragraphs 1, 2 and 3 shall be deleted and replaced by the following:

"1. Dans le transport de bagages enregistrés, un bulletin de bagages doit être délivré qui, s'il n'est pas combiné avec un billet de passage conforme aux dispositions de l'article 3, alinéa 1er, ou n'est pas inclus dans un tel billet, doit contenir:

"1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

a) l'indication des points de départ et de destination;

a) an indication of the places of departure and destination;

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929. Done at The Hague, on 28 September 1955. 478 U.N.T.S. 371

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prevues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) un avis indiquant que, si le transport comporte une destination finale on une escale dans un pays autre que le pays de départ, il peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de perte ou d'avarie des bagages."

b) l'alinéa 4 est supprimé et remplacé par la disposition suivante:

"2. Le bulletin de bagages fait foi, jusqu'à preuve con-

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that; if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage."

b) paragraph 4 shall be deleted and replaced by the following:

"2. The baggage check shall constitute *prima facie*

traire, de l'enregistrement des bagages et des conditions due contrat de transport. L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois, si le transporteur accepte la garde des bagages sans qu'un bulletin ait été délivré ou si, dans le cas où le bulletin n'est pas combiné avec un billet de passage conforme aux dispositions de l'article 3, alinéa 1 *c*), ou n'est pas inclus dans un tel billet, il ne comporte pas l'avis prescrit à l'alinéa 1 *c*) du présent article, le transporteur n'aura pas le droit de se prévaloir des dispositions de l'article 22, alinéa 2."

evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1 *c*)) does not include the notice required by paragraph 1 *c*) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2."

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. 10 I.L.M. 613 (1971)

Article II. L'article 3 de la Convention est supprimé et remplacé par les dispositions suivantes:

"Article 3

1. Dans le transport de passagers, un titre de transport individuel ou collectif doit être délivré, contenant:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et si une ou plusieurs escales sont prévues sur le territoire d'un autre Etat, l'indication d'une de ces escales.

2. L'emploi de tout autre moyen constatant les indications qui figurent à l'alinéa

Article II. Article 3 of the Convention shall be deleted and replaced by the following:—

"Article 3

1. In respect of the carriage of passengers an individual or collective document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. 10 I.L.M. 613 (1971)

1, a) et b), peut se substituer à la délivrance du titre de transport mentionné audit alinéa.

3. L'inobservation des dispositions de l'alinéa précédent n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention, y compris celles qui portent sur la limitation de responsabilité."

Article III. L'article 4 de la Convention est supprimé et remplacé par les dispositions suivantes:

"Article 4

1. Dans le transport de bagages enregistrés, un bulletin de bagages doit être délivré qui, s'il n'est pas combiné avec un titre de transport conforme aux dis-

a) and b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability."

Article III. Article 4 of the Convention shall be deleted and replaced by [sic] following:—

"Article 4

1. In respect of the carriage of checked baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a document of carriage

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. 10 I.L.M. 613 (1971)

positions de l'article 3, alinéa 1er, ou n'est pas inclus dans un tel titre de transport, doit contenir:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et si une ou plusieurs escales sont prévues sur le territoire d'un autre Etat, l'indication d'une de ces escales.

2. L'emploi de tout autre moyen constatant les indications qui figurent à l'alinéa 1, a) et b), peut se substituer à la délivrance du bulletin de bagages mentionné audit alinéa.

3. L'inobservation des dispositions de l'alinéa précédent n'affecte ni l'existence ni la validite du contrat de

which complies with the provisions of Article 3, paragraph 1, shall contain:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the baggage check referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. 10 I.L.M. 613 (1971)

transport, qui n'en sera pas moins soumis aux règles de la présente Convention, y compris celles qui portent sur la limitation de responsabilité."

of the contract of carriage which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability."

The following is an actual size reproduction of the Montreal Advice as contained in the LOT passenger tickets of plaintiffs' decedents printed in 8.5 point type size:

Page 4

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination.

For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. Dollars 75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the Carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death of or personal injury to passengers is limited in most cases to approximately U.S. Dollars 10,000 or U.S. Dollars 20,000.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request. Additional protection can usually be obtained by purchasing insurance from a private Company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your Airline or Insurance Company Representative.

NOTE: The limit of liability of U.S. Dollars 75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. Dollars 58,000 exclusive of legal fees and costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately $ 9.07 per pound ($ 20.00 per kilo) for checked baggage and $ 400 per passenger for un-checked baggage; (2) for travel wholly between U.S. points, to $ 500 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

The following is an actual size reproduction of the Montreal Advice in 10 point modern type:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U. S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. The limit of liability of U. S. $75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a country where provision is made for separate award of legal fees and costs, the limit shall be the sum of U. S. $58,000 exclusive of legal fees and costs. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U. S. $10,000 or U. S. $20,000.

The names of carriers, parties to such special contracts, are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

AAC REV. 1-74

NO. 83-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH AT WARSAW, POLAND ON MARCH 14, 1980, MDI 441

POLSKI E. LINIE LOTNICZE (LOT POLISH AIRLINES),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUUIT

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Questions Presented

Given an admission by LOT Polish Airlines that it did not provide decedent Robles with a ticket for international transportation from New York to Warsaw which included an "Advice to International Passengers on Limitation of Liability" which complied with the "at least as large as 10-point modern type" mandate of the Federal Aviation Regulations ¶221.175 (A) and the Montreal Agreement . . .

1. Was the United States Court of Appeal for the Second Circuit and the District Judge not correct in holding that the airline may not limit its liability to Robles' heirs and that the airline is absolutely liable by reason of its Montreal Agreement waiver of Warsaw Convention defenses; and

2. Does the decision of the appellate court below, which is wholly consistent with *Lisi* v. *Alitalia-Linee Aeree Italiane, S.P.A.*, 370 F.2d 508 (2nd Cir. 1966), *aff'd by an equally divided court,* 390 U.S. 455 (1968) and other appellate court decisions, warrant review by this court.

TABLE OF CONTENTS

PAGE

Table of Authorities

Cases Cited

Statutes Cited

Regulations Cited

Other Authorities Cited

NO. 83-5

IN THE

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Introduction

Respondents oppose LOT Polish Airlines' petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Summary of Argument

This controversy arises in the context of an action for wrongful death. Yreno Roman Robles, Jr. and others were passengers aboard Petitioner's aircraft who were killed when the plane crashed near the end of an international flight from New York to Warsaw. Because of the "international" character of the transportation Petitioner asserted that its liability was limited by the Warsaw Convention[1] as modified by the Montreal Agreement.[2]

The United States Court of Appeals for the Second Circuit and the District Court accepted LOT's *admission* (A3a, A10a, A20a, A22a)* that it did not deliver a ticket to the decedent Robles which included an "Advice to International Passengers on Limitation of Liability" which complied with the minimum 10-point modern type-size requirement set forth in §221.175(a) of the Federal Aviation Regulations (F.A.R.) (A83a) and the Montreal Agreement (A72a). The advice was in 8.5-point type. This failure and breach of the Montreal Agreement precludes the airline from limiting its liability to the decedent's heirs. It furthermore renders the airline absolutely liable for wrongful death damages in accordance with clear and

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.J. No. 876, 137 L.N.T.S. 11 (Adherence of United States proclaimed October 29, 1934).

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. 18900, approved by Order E-28680, May 13, 1966 (Docket No. 17325).

* "A" references are to the Appendix included in Petitioner's Petition herein.

unequivocal terms of the Montreal Agreement and "Tariff" incorporated therein.[3]

The result below follows *Lisi* v. *Alitalia-Linee Aeree Italiene, S.P.A.*, 370 F.2d 508 (2nd Cir. 1966) *aff'd by an equally divided court*, 390 U.S. 455 (1968).

The unanimous decision of the Second Circuit presents no issues of a constitutional dimension, and is wholly consistent with judicial interpretation of the ticket de-

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[3] The "Tariff" reads as follows:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw, October 12, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague Septembeer 29, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol which, according to the Contract of Carriage, includes a point in the United States of America as a point or origin, point of destination or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocoll.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

livery requirements of Article 3(2) of the Warsaw Convention[4], as modified by the Montreal Agreement.

For the reasons set forth below, LOT's petition for a writ of certiorari should be denied.

ARGUMENT

The Warsaw Convention was adhered to by the United States in 1934. Its purpose at that time was to limit the liability of international air carriers for death or injury to passengers so that the infant international air-

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[4] Article 3 of the Warsaw Convention provides:

> "(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises the right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

line industry could develop. *See,* Lowenfeld & Mendelson, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967). Because the damage limitation adversely affected air travelers by limiting the damages they could recover for death or injury, Article 3 (2) of the Convention mandated that each air carrier "deliver" to its passengers "a statement that the carriage is subject to the rules relating to liability established by this convention" (A97a). *See Lisi* v. *Alitalia, supra.*

Initially promulgated in 1963, F.A.R. §221.175, (28 Fed. Rec. 3281 (1963)) specified the form of "statement" required to disclose the airlines limited liability, and the minimum 10 point modern type-size. International air carriers were required to abide by this regulation as a condition of being awarded a Foreign Air Carrier permit under 49 U.S.C. §1372.

LOT's contention that its violation of the "at least 10 point type" requirement should be overlooked or considered "insubstantial" completely disregards the letter of the law, the intent of the minimum type requirement and the circumstances in which the standard was established.

The history of the Warsaw Convention "notice" provision demonstrates that its breach by LOT is a substantial violation of the treaty. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967).

By 1965, the United States, acknowledged to be the dominant factor in international air transportation, was so disenchanted and dissatisfied with the low limits of recovery allowed by the Warsaw Convention that on November 15, 1965, it filed a "letter of denunciation" of the treaty which, if not withdrawn, would have become

effective six months later. Had that happened, the United States would no longer have been a party to the treaty. The international airlines, intent upon maintaining the limited liability system, became concerned that they might lose the preferred status they had somehow preserved at the expense of the passengers since 1929, even though, by 1966, it was generally conceded that there was no economic justification for the system.

In order to forestall the United States' November 15, 1965 letter of denunciation from becoming effective, the international airlines with the aid of our Government concluded the Montreal Agreement (A72a). The airline signatories agreed, with respect to international transportation involving a United States point of departure, destination or stopping place,

> (1) to waive the defenses available to them under Article 20 of the Warsaw Convention;
>
> (2) to waive the limitation of liability contained in Article 22 of the Warsaw Convention up to $75,000; and
>
> (3) reiterated that the airlines must give passengers written notice with their tickets of the limitation of liability provisions in at least 10 point modern type.

Based upon the airlines' *contractual* commitments articulated in the Montreal Agreement the United States withdrew its letter of denunciation on May 13, 1966.

The 10 point type requirement was obviously intended to establish a clear, objective and uniform standard of what would be an acceptable and adequate minimum form of notice to passengers of the Warsaw Convention—Montreal Agreement liability limits. The standard was designed

to preclude precisely the arguments about type style and size which LOT urges upon this court now and which were considered by this court in *Lisi* v. *Alitalia-Linee Aeree Italiene, S.P.A.*, 370 F.2d 508 (2nd Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).[5]

Therefore, giving notice of limited liability in less than "10 point modern type" is, under the Montreal Agreement and F.A.R. §221.175(a) *inadequate as matter of law.*

LOT and all the international airlines knew that following their [Montreal] agreement to abide by the "10 point type standard" they would be estopped from claiming that a smaller print size would constitute compliance. The airlines ratified the standard. The plain meaning of the Montreal Agreement in this regard is clear and unambiguous.

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[5] The Second Circuit has, on numerous occasions, discussed the background and overall effect of the Warsaw Convention and the Montreal Agreement. *See, e.g. Franklin Mint Corp.* v. *Trans. World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982); *cert. granted*, —— U.S. —— (1983); *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982); *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 114 (1979); *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Molitch* v. *Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970), *rev'd on other grounds*, 436 F.2d 42 (2d Cir. 1970).

Other courts have also considered the history and effect of the Warsaw-Montreal system. *See, e.g., In Re Air Crash In Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982); *Maghsoudi* v. *Pan American World Airways, Inc.*, 470 F.Supp. 1275 (D. Hawaii 1979).

Strict compliance with the Treaty is required for an airline to have the benefit of limited liability.

Ludecke v. *Canadian Pacific Airlines, Ltd.*, 98 D.L.R. 3d 52 (Can. 1979) relied upon by Petitioner (A50a) though finally decided in 1979 involved a March, 1966 Tokyo aircrash with no United States involvement, and no minimum type size requirement by government regulation or agreement. It is, therefore, irrelevant to this controversy or the issues before this court.

Neither LOT nor any other airline can claim any surprise at being deprived of the Warsaw Convention's limited liability if it fails to deliver a proper ticket. *Lisi* teaches that the failure to deliver a proper ticket—one with proper notice of limited liability—has precisely that effect. *Lisi*, 370 F.2d at 514. *See also, Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 861 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

The District Court below correctly noted:

> Here, the character of the performance promised, notice in a specified type size, itself suggests that strict compliance was intended by the parties to the Montreal Agreement. But it is because of the purposes of that agreement and the degree to which they would be frustrated if the argument were permitted that I conclude that LOT's defense of substantial performance must be rejected.
>
> The purpose of the Montreal Agreement (as distinguished from the purpose of the "special contracts" between carriers and passengers entered into pursuant to it), like the purpose of the Warshaw Convention it preserved, was to regulate by uniform terms the conditions on which the United States would continue to adhere to the Warsaw Convention and on which the air carriers would hereforth deal with their customers. *See Reed* v. *Wiser*, supra, 555

> F.2d at 1090-91. Thus, while the purpose of the contract evidenced by the passenger ticket was to provide international air transportation and give "adequate" notice of the carrier's limitations on its absolute liability, the purpose of the Montreal Agreement was to secure a uniform standard as to what constituted adequate notice subject to easy administration and rapid determination of the parties' rights. *Id.* Given such a quasi-legislative purpose it may be doubted whether the doctrine of substantial performance has any application at all to a contract such as this one.

It is now universally accepted that the liability of an airline engaged in international transportation is limited only if it delivers a ticket which gives adequate and proper notice to a passenger of the limitations imposed by the Warsaw Convention-Montreal Agreement scheme. *Demanes* v. *Flying Tiger Line, Inc.*, 10 Avi. 17,611 (N.D. Cal. 1967); *Glassman* v. *Flying Tiger Line, Inc.*, 9 Avi. 18,295 (N.D. Ca. 1966); *Burdell* v. *Canadian Pacific Airlines, Ltd.*, 10 Avi. 18,151 (Ill. Cir. 1968); *Bayless* v. *S.A. Empress de Viacao Aereline Rio Grandense*, 10 Avi. 17,881 (S.D.N.Y. 1968); *Molitch* v. *Irish International Airlines*, 11 Avi. 17,396 (S.D. N.Y. 1970), *rev'd on other grounds*, 436 F.2d 42 (2d Cir. 1970); *Manion* v. *Pan American World Airways, Inc.*, 55 N.Y.2d 398, 449 N.Y.S. 2d 693 (1982).

In *Lisi*, this Court rejected a four-point type notice. As Judge Kaufman writing for the Second Circuit Court there stated, the notice was "camouflaged in Liliputian print", 370 F.2d at 514, and did not give passengers the notice require by Article 3(2) of the Warsaw Convention. Since *Lisi* involved pre-Montreal Agreement transportation, there was arguably an issue as to what constitutes adequate notice under Article 3(2). The Montreal Agreement, and

the Federal Aviation Regulation it incorporates, subsequently defined *as a matter of law* what typesize constitutes adequate notice of the carriers' limited liability.

Now despite the fact that Federal Aviation Regulation §221.175(a) provides that the notice of limitation of liability be printed in type "at least as large as ten point modern type"; and despite the fact that the Montreal Agreement, to which LOT is a signatory, calls for precisely the same minimum requirement; and despite the fact that LOT, in its own tariff, has contracted to comply with the Federal Aviation Regulations Petitioner still claims that the requirement has no binding significance.

Simply stated, LOT's failure to abide by the objective standard notice of limited liability to which it subscribed deprives it of such limited liability under the Convention and Montreal Agreement. The airlines, including LOT have preserved the limited liability system in international transportation by promising our government, and through it the international airline passengers, that, among other things, they would give Notice of the Warsaw Convention liability limitations in "10 point type". LOT cannot complain or seek relief from its failure to abide by its express written convenants, F.A.R. §221.175(a) and its own tariff.

As the District Court below observed, LOT should be precluded from asserting its defenses both under the Agreement and under the underlying Warsaw Convention if it failed to deliver adequate notice:

> Plaintiffs argue that the effect of defendant's breach of the notice provisions of the Montreal Agreement is not a return to the Article 20(1) defenses, but rather application of the relevant provisions of the underlying Convention which the Agreement modi-

> fies, specifically that part of Article 3(2) which precludes assertion of defenses limiting or excluding liability in the absence of delivery of a ticket meeting the requirements of the Convention . . .
>
> Since the Montreal Agreement was clearly intended to operate within the framework and incorporates all the relevant provisions of the Convention, Lowenfeld & Mendelsohn, *supra,* 80 Harv. L. Rev. at 597, the defendant's breach of the provisions of the Montreal Agreement with respect to the delivery of a conforming ticket has the same effect as non-delivery of a conformink ticket as set forth in Article 3(2) of the Convention. Accordingly, I conclude that defendant is not entitled to assert its defenses under Article 20(1) of the Convention as to those claimants suing on behalf of decedents to whom the defendant failed to deliver a ticket meeting the type size requirements of the Montreal Agreement.

The Second Circuit correctly understood the interplay of the Montreal Agreement and Convention and recognized the unfairness of any other result.

To allow LOT to reassert an Article 20(1) defense where it has breached the "notice" provision would be to allow it to be advantaged by its own violation. This would be plainly inconsistent with the intent of the Montreal Agreement and would shift the burden of LOT's breach to the innocent passenger.

CONCLUSION

Petitioner has not shouldered its burden of identifying special or important considerations warranting review on certiorari. Indeed, the opinion of the United States Court of Appeals for the Second Circuit was entirely correct. For the foregoing reasons it is respectfully requested that the petition for the writ of Certiorari sought by LOT Polish Airlines be denied.

Respectfully submitted,

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Dated: August 29, 1983

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH DISASTER AT WARSAW, POLAND, ON MARCH 14, 1980, MDL-441

POLSKIE LINIE LOTNICZE
(LOT Polish Airlines),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Restated

Whether the Court should exercise its discretion and grant the petition for writ of certiorari to review a long settled issue relating to treaty interpretation when the Court has in the past declined to review the issue in substantially identical circumstances and where the matter is not ripe for review and the interpretation urged by petitioner would not justify reversal of the judgment of the lower court?

TABLE OF CONTENTS

PAGE

Table of Authorities

Cases Cited

Statutes and Other Authorities

United States Code

Code of Federal Regulations

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

This Brief in Opposition to the Petition by Polskie Linie Lotnicze (LOT) for Writ of Certiorari is respectfully submitted on behalf of respondents named in seven

of the eight individual actions[1] and, as Lead Counsel for plaintiffs in the cases consolidated under Multidistrict Litigation Docket No. MDL-441, on behalf of the other identically affected litigants whose related passenger death actions arise out of the LOT air disaster and are subject to the consolidation and transfer order of the Judicial Panel on Multidistrict Litigation.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 705 F.2d 85 (2d Cir. 1983). The opinion of the United States District Court for the Eastern District of New York is reported at 535 F. Supp. 833 (E.D.N.Y. 1982).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered April 8, 1983. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1) (1976).

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[1] Respondents represented herein are next of kin of decedents Elliott Chavis, Stephen J. Smiegel, George Pimental, Joseph F. Bland, Ray L. Wesson, his wife Delores A. Wesson, John Radison and Byron M. Lindsay, each of whom was an American citizen traveling under the auspices of the United States Amateur Athletic Union (AAU) in connection with a boxing tournament that was scheduled to be held in Warsaw, Poland between the AAU Boxing Team and the national team of Poland.

Treaties and Regulation Involved

WARSAW CONVENTION*

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he

* 49 Stat. 3000; T. S. 876; 137 LNTS 11.

proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

MONTREAL AGREEMENT

1966

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22

(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern

type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country or origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

_____

_____

_____

_____

_____

14 C.F.R. §221.175 (1982)

§221.175 Special notice of limited liability for death or injury under the Warsaw Convention.

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATIONS OF LIABILITY

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on: (1) Each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further,* That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in the charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section: *Provided, however,* That an air carrier, except an air taxi operator subject to Part 298 of this subchapter, or foreign air carrier which provides a higher limitation of liability than that set forth in the Warsaw Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreement was approved by the Board by Order E-23680, dated May

13, 1966 (31 FR 7302, May 19, 1966), may use the alternate form of notice set forth in the proviso to §221.-176(a) of this chapter in full compliance with the posting requirements of this paragraph. *And provided further,* That an air taxi operator subject to Part 298 of this subchapter, which provides a higher limitation of liability than that set forth in the Warsaw Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreement was approved by the Board by Order E-23680, dated May 13, 1966 (31 FR 7302, May 19, 1966), may use the following notice in the manner prescribed above in full compliance with the posting requirements of this paragraph.

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

> Passengers traveling to or from a foreign country are advised that airline liability for death or personal injury and loss or damage to baggage may be limited by the Warsaw Convention and tariff provisions. See the notice with your ticket or contact your airline ticket office or travel agent for further information.

Such statements shall be printed in bold faced type at least one-fourth of an inch high.

(Sec. 402, 72 Stat. 757; 49 U.S.C. 1372)

[ER-708, 36 FR 22229, Nov. 23, 1971, as amended by ER-837, 39 FR 8319, Mar. 5, 1974; ER-844, 39 FR 16120, May 7, 1974]

Respondents' Counter Statement of the Case

Unlike the transportation considered by the Canadian Supreme Court in *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (Can. 1979), Pet. App. 50a, or that made the subject of the Second Circuit's opinion in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *affirmed by an equally divided court,* 390 U.S. 455 (1968), *reh'g denied,* 390 U.S. 929 (1968), the transportation in question, which tragically resulted in the deaths of all aboard petitioner's aircraft, was governed not only by the provisions of the treaty commonly referred to as the Warsaw Convention[2] but also by "special contracts of carriage" called the Montreal Agreement[3], *Lowenfeld Aviation Law,* 2d Ed. § 5.42, pp. 7-143-144, M. Bender, N.Y. (1981). Since petitioner held a foreign air carrier permit issued by the Civil Aeronautics Board (CAB) pursuant to section 402 of the Federal Aviation Act, 49 U.S.C. § 1372 (1976 & Supp. IV 1980), LOT's compliance with the terms of the Montreal Agreement was also a condition to its operation in the United States as a foreign carrier, 14 C.F.R. Appendix to Part 211 § 10(h)(1); and see the copy of LOT's foreign air carrier permit in the Appendix to this Brief at page App. 1a.

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[2] Concluded in Warsaw, Poland in 1929 and ratified by the U.S. Senate in 1934, the Warsaw Convention is officially titled "A Convention for the Unification of Certain Rules Relating to International Air Transportation and Additional Protocol" [49 Stat. 3000, *et seq.*].

[3] The official title of the Montreal Agreement is "Agreement Relating to Liability of the Warsaw Convention and Hague Protocol" [Agreement CAB 18990, Approved by Executive Order E-23680 of May 13, 1966 (31 Fed. Reg. 7302)].

The events leading to and the circumstances surrounding the inception, acceptance and eventual execution of the Montreal Agreement are narrated by Professor Andreas F. Lowenfeld, the Agreement's author, in his Treatise on aviation law, *Lowenfeld, Aviation Law* 2 Ed., *supra* §§ 5.2 to 5.42. A more concise background summary appears in the opinion of the Circuit Court, 705 F.2d 85, 86-88 (Pet. App. 8a-9a); *see also,* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 546-52, 586-97 (1967) and *Speiser and Krause, Aviation Tort Law,* Vol. 1, § 11:19, pp. 674-680, Lawyers Cooperative Pub. Co., Rochester (1978).

In sum, the Montreal Agreement arose out of dissatisfaction on the part of the United States with the passenger liability limits contained in Article 22(1) of the Warsaw Convention (approximately $8300) and as increased under the Hague Protocol of 1955 (approximately $16,600) to which the United States did not adhere. To induce the United States to withdraw the denunciation of the Treaty that was to take effect on May 15, 1966, the air carriers of the world, including petitioner, agreed not only to waive Article 20(1) defenses up to a limit of $75,000 per passenger injury but also to ". . . furnish to each passenger . . . notice [of treaty limits] . . . printed in type at least as large as 10 point modern type. . . ." *Reed* v. *Wiser,* 555 F.2d 1087 (2d Cir. 1980), *cert. denied,* 434 U.S. 922 (1981); *Dunn* v. *Trans World Airlines,* 589 F.2d 408 (9th Cir. 1978); *In Re Air Crash in Bali, Indonesia,* 462 F. Supp. 1114, 1123-24 (C.D. Cal. 1978), *rev'd on other grounds,* 684 F.2d 1301 (9th Cir. 1982); *Husserl* v. *Swiss Air Transport Co., Ltd.,* 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd,* 485 F.2d 1240 (2d Cir. 1973); *see also* 50 Dept. State Bull. 923 (1965); Dept. State Press Release Nos. 110 and 111, May 13 and 14, 1966; 54 Dept.

of State Bull. 955-57 (1966); CAB Press Release 66-61 5/13/66.

The district court's dismissal of petitioner's treaty defenses, 535 F. Supp. 833 (E.D.N.Y. 1982)[4] and the unanimous affirmance thereof by the Court of Appeals, 705 F.2d 85 (2d Cir. 1983)[5] were based on the undisputed fact that LOT's tickets did not meet the condition precedent in the Montreal Agreement requiring that notice of treaty limitations be furnished in print size no less than 10 point modern type. The same print size specification has been mandated by the CAB since 1963, 14 C.F.R. 221.175 and, in the interim, has been approved, *Deutsche Lufthansa Aktiengesellschaft* v. *C.A.B.*, 379 F.2d 912, 917-918 (D.C. Cir. 1973) or cited favorably by the Circuit Courts, *Lisi* v. *Alitalia*, 370 F.2d 508, 514 n.10 (2d Cir. 1966); *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406, 413 n.10 (2d Cir. 1982); *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d at 90 n.11; (Pet. App. 13a, n.11 and 14a). The applicability of and the lower courts' reliance upon the Montreal Agreement distinguishes this from the *Lisi* and *Ludecke* cases which were concerned solely with an interpretation of the Warsaw Convention. As observed by the Court of Appeals, "[W]hatever merit LOT's argument might have

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[4] Per Hon. Charles P. Sifton who is the trier of the facts as well as the law. This because petitioner, despite its prior waiver of sovereign immunity as a condition to operating in the United States, successfully moved to strike respondents jury demands pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, 535 F. Supp. at 836 (E.D.N.Y. 1982).

[5] The Second Circuit Panel was comprised of C.J. Oakes, the author of the majority opinion in *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982), C.J. Sloviter, of the 3d Circuit sitting by designation and C.J. Kearse.

were we considering the adequacy of notice solely under the Warsaw Convention, the fact remains that we are not," 705 F.2d at 89, (Pet. App. 11a).

Based on Petitioner's perception of Footnote 2 to the opinion of the Court of Appeals (Pet. App. 3a) and the reference therein to the Circuit Court's holding in *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406, petitioner was granted leave by the district court to conduct discovery with respect to the modes of transportation used by decedents in their travel to New York for the flight in question and with respect to the adequacy of notice, if any, received by decedents during the course of such prior unconnected transportation. Pending completion of such discovery in the Fall, summary judgment in at least three companion passenger actions has been withheld so that petitioner may perfect its record and seek further clarification from the Court of Appeals.

REASONS FOR DENYING THE WRIT

1. The matter is not ripe for review nor is it important enough to warrant the exercise of the Court's discretion.

In the 17 years since *Lisi* v. *Alitalia,* 370 F.2d 508, was decided, the airline industry has replenished its supply of *Lisi* like ticket stock with tickets that conform to the print size specifications of the Montreal Agreement and the Board's Rules. Although the *Ludecke* case was decided by the Canadian Supreme Court in 1979, it arose out of a crash that occurred in Tokyo on March 4, 1966 and thus involved a circumstance that is not likely to reoccur in an American court[6]; *i.e.,* a notice question based on undersized print in a ticket that is subject to the Warsaw Convention but not to the Montreal Agreement or the Hague Protocol.[7] Had either the Montreal Agreement or the Hague Protocol applied to passenger Ludecke's transportation, the carrier's Warsaw defenses would have been stricken as was done in the action for the death of a fellow passenger, *Montreal Trust Company, et al.* v. *Canadian Pacific Airlines, Ltd.,* 72 D.L.R. 3d

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[6] The same crash gave rise to the Second Circuit Opinion in *Smith* v. *Canadian Pacific Airlines, Ltd.,* 452 F.2d 798 (2d Cir. 1971).

[7] Passenger actions lacking sufficient *nexus* with the United States for the purposes of the Montreal Agreement are subject to dismissal under Article 28 for lack of subject matter jurisdiction, *Gayda* v. *LOT,* 702 F.2d 424 (2d Cir. 1983), citing *Smith* v. *Canadian Pacific,* 452 F.2d 798. Cases subject to the notice requirements of the Hague Protocol are governed by the holding in *Lisi* rather than *Ludecke.* See opinion of the Supreme Court of Canada in *Montreal Trust Co. et al.* v. *Canadian Pacific Airlines Ltd.,* 72 D.L.R.3d 257 (1976), (App. 10a).

257, 14 Avi. Cas. (CCH) 17,510 (Sup. Ct. of Canada 1976). Accordingly, the conflict between the *Ludecke* and *Lisi* cases is limited in significance to historic and academic interest.

Petitioner has not shown that conformity to the modern standard expressed in the Board's Rules and the Montreal Agreement presents a problem to the airline industry at large or to petitioner in particular. Unlike the ticket format cases decided in the wake of *Lisi* v. *Alitalia,* 370 F.2d 508, the Second Circuit's holding in this case is not addressed to ticket stock used throughout the industry but to an extraordinary anomaly in a batch of LOT's tickets which, according to Petitioner, resulted from an unintended reduction in print size during offset reproduction (App. 8a).

To the extent that petitioner intends to seek clarification from the Court of Appeals with respect to the scope and import of Footnote 2 to the lower court's opinion, 705 F.2d at 86 (Pet. App. 3a), the matter is also not ripe for consideration by this Court.

2. Petitioner presents nothing to warrant re-examination of an issue resolved in conformity with well settled law by a unanimous panel comprised of members of two Circuits which issue the Court has previously declined to review in substantially identical circumstances.

The decision of the Canadian Supreme Court in *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, is not only anachronistic, *Montreal Trust Co.* v. *Canadian Pacific Airlines, Ltd.*, 72 D.L.R.3d 257, 14 Avi. Cas. (CCH) 17,510 (Sup. Ct. Canada 1976), it is also against the grain of American jurisprudence and the overwhelming weight of

case authority, *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 383 U.S. 816 (1965), *reh'g denied*, 382 U.S. 933 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Manion* v. *Pan American World Airways*, 55 N.Y. 2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Bayless* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig)*, 10 Avi. Cas. (CCH) 17,881 (S.D.N.Y. 1968); *Eck* v. *United Arab Airlines, Inc.*, 12 Avi. Cas. (CCH) 18,427 (N.Y. Sup. Ct. 1974); *Boryk* v. *Aerolineas Argentinas*, 332 F. Supp. 405 (S.D.N.Y. 1971); *Burdell* v. *Canadian Pacific Airlines, Ltd.*, 10 Avi. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968); *Demanes* v. *Flying Tiger Line Inc.*, 10 Avi. Cas. (CCH) 17,611 (N.D. Cal. 1967); *Glassman* v. *Flying Tiger Line, Inc.*, 10 Avi. Cas. (CCH) 18,296 (N.D. Cal. 1966).

Following denial of rehearing in *Lisi* v. *Alitalia*, 370 F.2d 508, the Court declined to review the issue presented by LOT's petition herein under substantially identical circumstances, *Egan* v. *Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

3. Changing the rule in *Lisi* v. *Alitalia*, will not affect the holding of the Court of Appeals in this case.

As stated previously, *Lisi* v. *Alitalia*, 370 F.2d 508 was decided without reference to the Montreal Agreement or to the comparable notice requirements of the Hague Protocol, *Montreal Trust Co.* v. *Canadian Pacific*, (App. 10a). Reconsideration of the holding in *Lisi*, as urged by petitioner, would not affect the *ratio decidendi* of the lower court in this case, 705 F.2d at 89, (Pet. App. 11a).

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STUART M. SPEISER
FRANK H. GRANITO, JR.
Counsel for Respondents Smiegel, Pimental, Bland, Wesson, Chavis, Radison and Lindsay and Lead Counsel for Plaintiffs in MDL-441
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SPEISER & KRAUSE, P.C.
STUART M. SPEISER
FRANK H. GRANITO, JR.
RUDOLPH V. PINO, JR.

Dated: July 30, 1983

[APPENDIX FOLLOWS]

APPENDIX

APPENDIX

LOT Foreign Air Carrier Permit

SPECIMEN PERMIT

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

PERMIT TO FOREIGN AIR CARRIER
(as amended)

POLSKIE LINIE LOTNICZE (LOT)

is authorized, subject to the provisions set forth, the provisions of the Federal Aviation Act of 1958, as amended, and the orders, rules, and regulations of the Board, to engage in foreign air transportation of persons, property, and mail, as follows:

> Between a point or points in Poland via intermediate points in Denmark, the Netherlands, Belgium, France or the United Kingdom and Montreal Canada; and the terminal point New York, New York.

The holder shall be authorized to engage in charter trips in foreign air transportation, subject to the terms,

conditions, and limitations prescribed by the Board's Economic Regulations.

This permit shall be subject to the following terms, conditions, and limitations:

(1) Prior to the commencement of operations under this permit to either France or the United Kingdom, the holder shall elect to serve intermediate points in either France or the United Kingdom and shall notify the Government of the United States of its selection; the country not selected shall be deemed to be deleted from the permit.

(2) The holder may serve Montreal both as a point intermediate to and beyond New York.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the Polish People's Republic for Polish international air service.

The holder shall not operate any aircraft under the authority granted by this permit unless the holder complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention.

The initial tariff filed by the holder shall not set forth rates, fares, and charges lower than those then in effect for any U.S. air carrier in the same foreign air transportation: *However,* this limitation shall not apply to a tariff filed after the initial tariff regardless of whether this subsequent tariff is effective before or after the introduction of the authorized service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting

international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the Polish People's Republic shall be parties.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder shall not provide foreign air transportation under this permit unless (1) there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the

insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

The exercise of the privileges granted shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Board.

This permit shall be effective on , and unless otherwise terminated as provided, shall terminate on March 31, 1982. Prior to the termination of this permit on March 31, 1982, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment which shall have the effect of eliminating the route here authorized from the routes which may be operated by airlines designated by the Government of the Polish People's Republic (or in the event of the elimination of any part of the route here authorized, the authority should terminate to the extent of such elimination), or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the Polish People's Republic in lieu of the holder, or (3) upon the termination or expiration of the Air Transport Agreement between the Government of the United States and the Government of the Polish People's Republic, dated July 19, 1972, as amended: *Provided,* that clause (3) shall not apply if, prior to the event specified in clause (3), the operation of the foreign air transportation here authorized becomes the subject of any treaty, convention, or agreement to which the United States and the Polish People's Republic are or shall become parties.

Lot Foreign Air Carrier Permit

The Civil Aeronautics Board through its Secretary, has executed this permit and affixed its seal on

Secretary

(Seal)

Affidavit of Abraham Meilen

UNITED STATES DISTRICT COURT
Eastern District of New York
MDL No. 441

ANGELA Y. ROBLES and MARGARET OJEDA, Co-Adminstrators of the Estate of YRENIO ROMAN ROBLES, JR., AKA JUNIOR ROBLES, Deceased,
Plaintiffs,

—against—

POLSKIE LINIE LOTNICZE, AKA LOT POLISH AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., a corporation, AMERICAN AIRLINES, INC., a corporation,
Defendants.

To Clerk:

This document pertains to Line Case No. CV-80-2977 (CPS) and should be filed in same.

AFFIDAVIT OF ABRAHAM MEILEN IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Affidavit of Abraham Meilen

ABRAHAM MEILEN, being first duly sworn, deposes and says:

1. I am over 21 years of age and the Vice President of Meilen Press, Inc., 443-445 Greenwich Street, New York, New York, one of the official printers for the United States Court of Appeals for the Second Circuit. I have been an officer of Meilen Press since 1963 and I have been employed in various capacities in the printing industry since 1931. I submit this Affidavit based upon my own personal knowledge and if necessary I could testify competently to the facts contained herein.

2. I have carefully examined an original sample ticket of the type issued by LOT Polish Airlines to plaintiffs' decedent which is identical to the one attached as Exhibit "A" to the Affidavit of Krzysztof Z. Resich in opposition to the within motion, and the following are my observations with respect thereto.

3. Modern type is not a specific type face. The phrase "modern type" describes a variety of typefaces that were introduced to the printing trade approximately fifty years ago.

4. Printed matter contains 72 "points" per vertical inch. If no "leading" is used, 10 point type contains 7.2 lines of type per inch. "Leading" is a horizontal space between lines set into linotype.

5. If no "leading" is used, 8.5 point type contains 8.47 lines of type per inch. The "Advice to International Passengers on Limitation of Liability" in the LOT sample ticket was printed and then offset so that it appears

to be 8.5 point type. The process of offsetting reduces the print size somewhat and it is possible, therefore, that the original print of the "Advice to International Passengers on Limitation of Liability" in the LOT ticket was 10 point type and then was reduced in size during the offsetting process.

6. The primary difference between 8.5 point type and 10 point type is that 10 point type of a specific text face is somewhat larger than 8.5 point type of the same text face. As a result, 10 point type contains fewer lines of print per inch than 8.5 point type.

7. As illustrated by the United States Government Printing Office pamphlet *Specimens of Type Faces* (attached hereto as Exhibit "A"), 10 point type of one text face varies in appearance and readability from 10 point type of another text face. For example, "11 Point No. 21" (Linotype) type has the appearance of 11 point type while "Cheltenham Condensed" (Monotype) type has the appearance of being smaller than 10 point type. Both of these types as shown in the respective paragraphs of Exhibit "A", however, are printed in 10 point type.

8. The "Advice to International Passengers on Limitation of Liability" on page 4 of the LOT sample ticket is within the range of size of type faces listed in Exhibit "A" hereto. The "Advice to International Passengers on Limitation of Liability" in the LOT sample ticket is more readable than some of the 10 point type faces shown in Exhibit "A" and it is equally as readable as the majority of the type faces listed therein. It also is readily apparent that the print of the "Advice to International Passengers on Limitation of Liability" in the

Affidavit of Abraham Meilen

LOT ticket is larger than many of the samples of 10 point type size shown in Exhibit "A" hereto.

Abraham Meilen

Sworn to before me, this
23rd day of July, 1981

Peter Meilen
Notary Public

Peter Meilen
Notary Public, State of New York
No. 31-7036275
Qualified in New York County
Commission Expires March 30, 1982

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd. (Ritchie, J.)

Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon and Dickson, JJ.

December 20, 1976.

Contracts—Carriage by air—Warsaw Convention, 1929—Tickets—Carrier required to give notice—Whether small inconspicuous print sufficient—Carriage by Air Act, R.S.C. 1970, c. 14, Sch. I, art. 3(1)(c).

By the *Carriage by Air Act*, R.S.C. 1970, c. C-14, Sch. I, incorporating the *Warsaw Convention, 1929*, as amended by The Hague Protocol, Sch. II (September 28, 1955, see 1963 (Can.), c. 33, s. 4), a carrier may limit its liability in respect of death or personal injury to passengers if (by art. 3(1)(*c*)) it delivers a ticket containing a notice referring to the *Warsaw Convention, 1929* and summarizing its effect. Before the amendment the text of the Convention had required a "statement" to a similar effect. A carrier delivered to a passenger a ticket containing a reference to the Convention in small and inconspicuous print. In an action to recover damages for the death of the passenger the trial Judge held that insufficient notice had been given to entitle the carrier to the benefit of the Convention. An appeal to the Quebec Court of Appeal was allowed. On further appeal to the Supreme Court of Canada, *held*, allowing the appeal, small print that was inconspicuous did not constitute a "notice" within the meaning of the amended Convention, though it might have been a "statement" within the meaning of the original text. A "notice" must be something in a form calculated to attract attention.

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd.
(Ritchie, J.)

Per Judson, J., Martland and Pigeon, JJ., concurring, dissenting: The decision of the Quebec Court of Appeal should be affirmed since the notice was reasonably legible and comprehensible.

[*Ludecke* v. *Canadian Pacific Airlines Ltd.* (1974), 53 D.L.R. (3d) 636, distd; *Mertens* v. *Flying Tiger Line, Inc.* (1965), 341 F. 2d 851; *Lisi* v. *Alitalia-Linee Aeree Italiene* (*sic*) (1966), 370 F. 2d 508, affg 253 F. Supp. 237, refd to]

APPEAL from a decision of the Quebec Court of Appeal allowing an appeal from a judgment of Challies, A.C.J., in favour of the plaintiff in an action to recover damages for the death of an air line passenger.

Peter R. Lack, for appellants.

W. Tyndale, Q.C., and *Alastair Paterson*, Q.C., for respondent.

D. Jack, for intervenant, Dora Hallam.

LASKIN, C.J.C., concurs with RITCHIE, J.

MARTLAND, J., concurs with JUDSON, J.

JUDSON, J. (dissenting):—The Quebec Court of Appeal has stated the issues in this appeal in clear and simple terms. First, did the ticket which was issued to the deceased passenger comply with the requirements of the *Warsaw Convention, 1929*, as amended by The Hague Protocol, so as to limit the carrier's liability? Second, was this notice reasonably legible and comprehensible? Their answer to both questions was "Yes" and they allowed the appeal and dismissed the action.

I agree entirely with their reasons for judgment and I would dismiss this appeal.

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd.
(Ritchie, J.)

RITCHIE, J.:—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec allowing an appeal from the judgment rendered at trial by Challies, A.C.J., and declaring that Canadian Pacific Airlines Limited was entitled to limit its liability in accordance with the provisions of art. 22 of the First Schedule of "An Act to amend the Carriage by Air Act" (The Hague Protocol), 1963 (Can.), c. 33, s. 3, with respect both to the death of the late Irving Joseph Stampleman and to the loss of his baggage as a result of the crash of one of the respondent's aircraft at Tokyo on March 4, 1966.

The appellants being the executor and the two surviving sons of the late Stampleman, commenced this action by writ of summons and declaration dated February 24, 1964, and submitted the following question of law for the decision of the Court in accordance with a joint statement of law and fact filed pursuant to art. 448 of the *Code of Civil Procedure*, 1965 (Que.), c. 80:

Question of Law

> That this submission relates and applies solely and exclusively to the question of law as to whether, based upon the facts hereinabove set forth and the contents of the Exhibits forming part of the said facts, the Defendant is entitled to avail itself of the provisions of Article 22 of the First Schedule of the aforesaid "Act to amend the Carriage by Air Act (the Hague Protocol) which limites (*sic*) the liability of the Defendant towards Plaintiffs as to the amount of damages payable by

Montreal Trust Co. v. Canadian Pacific Airlines, Ltd.
(Ritchie, J.)

> Defendant to Plaintiffs as a result of the death of Joseph Irving Stampleman in the crash of Defendant's aircraft at Tokyo International Airport, Tokyo, Japan on March 4, 1966 and as a result of the loss or destruction of the registered baggage of the late Mr. Stampleman.

The rights and liabilities of the parties are governed by the *Carriage by Air Act*, R.S.C. 1970, c. C-14, Sch. I, which incorporates in the law of Canada the French text of the *Warsaw Convention, 1929* as amended at The Hague in 1955, Sch. II (hereinafter referred to as "The Hague Protocol").

At the time of the crash Joseph Stampleman was travelling under a ticket issued by Air Canada on its own behalf and on behalf of successive carriers including the respondent. The ticket served as both passenger ticket and baggage check and the contemplated voyage was from Montreal to Vancouver to Hong Kong to Tokyo and return to Montreal. At the relevant time Canada, unlike the United Kingdom and Japan, was one of the high contracting parties to The Hague Protocol and it is the fact that the round trip began and ended in Canada which makes that the governing document.

The air ticket and baggage check in question are attached as exhibits to the agreed statement of facts and their contents are well summarized in the reasons for judgment of Mr. Justice Challies where he says:

> The ticket and baggage check, exs. P-1 and P-2 (ticket No. 014491120008), issued to the deceased by Air Canada contains near the top "subject to conditions of contract on page 2" which is readable

> with the naked eye and also in four and a half point type across the bottom the following reference to the Warsaw Convention: "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

Less than a month before rendering judgment in the present case (*i.e.*, December 31, 1971) Challies, A.C.J., had decided the case of *Ludecke* v. *Canadian Pacific Airlines Ltd.*, S.C.M. 746 832, in the Superior Court. That case arose out of the death of a passenger in the same air crash as Stampleman and the agreed question of law there posed under art. 448, *C.C.P.*, was similar in all respect to the question here at issue except that in the case of *Ludecke* it related to the defendant's right to limit its liability in accordance with the provisions of the *Warsaw Convention, 1929* whereas the present question is directed to the rights under The Hague Protocol amending that Convention.

In the *Ludecke* case Challies, A.C.J., held that the statement in the air ticket in question that "carriage is subject to the rules and limitation in relation to liability established by the Convention" printed as it was in four and a half point type was not a "Statement" as required by art. 4 of the Convention and that the carrier was therefore not entitled to limit its liability as to baggage but that it was covered by the limitation provision with

respect to the limitation provision for loss of life because of the wording of art. 3 of the Convention.

In the same case, Casey, J.A., speaking for the Court of Appeal (1974), 53 D.L.R. (3d) 636, found that the "statements" in four and a half point type in the ticket were reasonably readable and constituted compliance with the requirements of arts. 3 and 4 of the Convention so as to entitle the carrier to limit its liability as to any baggage claim and the claim for loss of life.

This judgment was not rendered until December 23, 1974. In the meantime (*i.e.*, December 31, 1971), Challies, A.C.J., rendered a judgment for the Superior Court in the present case in which he recognized the difference in wording between arts. 3 and 4 of the Convention which governed the *Ludecke* case and those articles as they had been amended by The Hague Protocol which governed here, but nevertheless stated that "for the reasons given by the undersigned in *Ludecke* v. *C.P.A.*", the carrier was not entitled to limit its liability as to either loss of life or loss of baggage.

In reversing this judgment, Casey, J.A., speaking on behalf of the Court of Appeal, concluded by saying of The Hague Protocol:

> There are only two questions involved—did the ticket include the notice required by arts. 3(1)(*c*) and 4(1)(*c*) and was this notice reasonably legible and comprehensible. As in the case of *Ludecke* my answer to both questions is yes and for this reason I would maintain this appeal.

In my view the answer to the question raised by this appeal must depend upon whether or not the Court of

Appeal was justified in relying upon its own interpretation of arts. 3 and 4 of the Convention in deciding a case which is governed by the same articles as amended by The Hague Protocol. The determination of this issue requires a consideration of the terms of these articles which provide:

WARSAW CONVENTION

Article 3

(1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

. . . . .

(*e*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.*

Article 4

(1) For the carriage of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

. . . . .

(3) The baggage check shall contain the following particulars:

(*h*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of the Convention. Nevertheless if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out in . . . . and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

(The italics are my own.)

THE HAGUE PROTOCOL

Article 3

(1) In respect to the carriage of passengers a ticket shall be delivered containing:

. . . . .

(*c*) a *notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers *for death or personal injury and in respect of loss of or damage to baggage.*

(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph (1)(c) of this article, the carrier shall not be entitled to avail himself of the provisions of Article 22.*

Article 4

[The relevant portions of which read:]

(1) In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph (1), shall contain:

. . . . .

(*c*) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect to loss of or damage to baggage.

The Hague amendments, in so far as they affect the present issue, are notable for the fact that (1) the Convention simply required the inclusion in the ticket of "a statement" relating to the limitation of the liability of the carrier as established by the Convention, whereas the amendment provided that such a statement should take the form of a "notice", and (2) that the amendment provided that in the absence of a "notice" the carrier is not entitled to avail himself of the limitation provisions in respect either of death or loss of baggage, whereas the Convention contains no such sanction with respect to claims for loss of life except in the case of no passenger ticket "having been delivered" to the claimant.

In holding that the company was not entitled to limit its liability for loss of the baggage in the *Ludecke* case, Challies, A.C.J., relied heavily on a number of American authorities to the effect that the "statement" in the ticket required by the Convention must be in such form as to afford the passenger "a reasonable opportunity to take self-protective" measures to compensate himself for the limitation on his rights which art. 22 creates in favour of the carrier.

The cases of *Mertens* v. *Flying Tiger Line, Inc.* (1965), 341 F. 2d 851, and *Lisi* v. *Alitalia-Linee Aeree Italiene* (*sic*) (1966), 370 F. 2d 508, are cited with approval by Mr. Justice Challies. In the latter case, MacMahon, D.J. [253 F. Supp. 237 at p. 243], speaking of a ticket containing the required "statement" in the same print as that in the present case, described it as "virtually invisible" and also as "diminutively sized and unemphasized by bold face type, contrasting colour, or anything else".

In allowing the appeal in the *Ludecke* case, Casey, J.A., declined to follow the American authorities, saying [at p. 638]:

> What I cannot concede is that we must accept the decisions cited by appellant as establishing the standards by which the legibility of this "statement" must be judged. My view is that on this matter of fact the Convention should contain its own criteria. Since it does not I see no reason why we should treat this case differently from the others that come before this Court. Proceeding from this premise and having examined the relevant documents I conclude that the Carrier did print these "statements" in reasonably readable type.

I think it must be understood that limitation on the liability of the carrier created by art. 22 of the Convention in both its original and its amended form constitutes an encroachment on the rights of the individual passenger and as such it is to be strictly construed and can only be invoked when the requirements of the article have been exactly complied with.

The effect of art. 3(2) of the Convention was to empower carriers to limit their liability to passengers by the simple process of delivering a ticket containing a "statement that the carriage is subject to the rules relating to liability established by the Convention" and the Court of Appeals has held in the *Ludecke* case that this requirement is met even when the "statement" is inconspicuously placed in four and a half point type. When the amendments were made by the Hague Protocol of 1955, an entirely new art. 3(2) was promulgated in which the requirement of a mere "statement" was deleted and the more elaborate provisions of the Protocol were substituted therefor. Under the amended art. 3(1)(*c*), the carrier is not only required to insert a "notice" but the terms of the notice are expressly provided for.

I do not think it can be assumed that the draftsmen of The Hague Protocol made the extensive changes which they did in art. 3 without weighing the words which they employed with some care and I cannot accept the suggestion that the substitution of the word "notice" for "statement" in arts. 3 and 4 was meaningless or ineffective. The French text of the Protocol governs its construction in case of any doubt and it was argued that the word "avis" bears a somewhat stronger meaning than "notice", but I do not need to base any conclusion on that argument as I am satisfied that both "a notice" or "un avis" mean at least something which is in a form calculated to attract attention.

As I have pointed out, Mr. Justice Casey in the course of his reasons for judgment in the *Ludecke* case, indicated his view "that on the matters of fact as to whether the 'statement' was sufficiently legible the Conven-

tion should contain its own criteria" and he considered that it did not do so. Had he been considering art. 3 (1)(*c*) of the Protocol, the learned Judge might have reached a different conclusion as it appears to me that that article does contain its own criteria, namely, that the statement shall be in such form as to constitute a "notice". Even if it were accepted that the four and one-half point type in which the requisite notice is reproduced at the foot of the first page of the ticket is reasonably readable, it cannot, in my view, be described as noticeable and it is not in a form which would attract the attention of the passenger in contradistinction to all the other material printed in the same type on the ticket. In relation to a claim for loss of life, art. 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was "delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects and with the greatest respect I think that the Court of Appeal erred in applying the reasoning which had been used in the *Ludecke* case in interpreting the Convention to the interpretation of the Protocol in the present case.

As I have indicated, I am of opinion that the four and one-half point type reproduction of the material required to be inscribed by art. 3(1)(*c*) of the Protocol was not a "notice" within the meaning of that article

and accordingly the carrier is not entitled to avail itself of the provisions of art. 22.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and direct that the question here submitted for determination be answered in the negative and that the respondent is not entitled to avail itself of provisions of art. 22 of the First Schedule to The Hague Protocol so as to limit its liability to the appellants as to the amount of damages payable as a result of the death of the late Joseph Irving Stampleman at Tokyo International Airport on March 4, 1966, and as a result of the loss or destruction of the registered baggage of the said Mr. Stampleman, the check for which was incorporated in his ticket.

The appellants will have their costs both here in the Court of Appeal.

SPENCE, J., concurs with RITCHIE, J.

PIGEON, J., concurs with JUDSON, J.

DICKSON, J., concurs with RITCHIE, J.

Appeal allowed.

No. 83-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE AIR CRASH DISASTER AT WARSAW, POLAND, ON MARCH 14, 1980, MDL 441

POLSKIE LINIE LOTNICZE (LOT POLISH AIRLINES),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE N. TOMPKINS, JR.
LAWRENCE MENTZ
Counsel for Petitioner
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Other Authorities:

PAGE

No. 83-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE AIR CRASH DISASTER AT WARSAW, POLAND, ON MARCH 14, 1980, MDL 441

POLSKIE LINIE LOTNICZE (LOT POLISH AIRLINES),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Briefs in Opposition[1] are misleading in several respects, misconstrue the nature of the Montreal Agreement and its relationship to the Warsaw Convention and fail to address the point that without the Second Circuit's reliance upon its earlier erroneous interpretation of Arti-

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[1] Separate Briefs have been submitted on behalf of Respondents Robles and Ojeda (filed August 31, 1983) and on behalf of Respondents Smiegel, Pimental, Bland, Wesson, Chavis, Radison and Lindsay (filed August 3, 1983). Their Briefs are hereinafter referred to as the Robles Brief and the Smiegel Brief, respectively. They are collectively referred to as Respondents in this Reply Brief.

cle 3(2) of the Warsaw Convention in *Lisi*,[2] the decision of the court below has no foundation in law, fact or history.

In apparent recognition of its lack of authority, Respondents make no attempt to support or uphold the decision by the Second Circuit in *Lisi*, which has been rejected by the Canadian Supreme Court in *Ludecke*[3] and respected commentators on international air law. Rather, Respondents rely completely[4] upon the provisions of the Montreal Agreement to support the holding below.

> The applicability of and the lower court's reliance upon the Montreal Agreement distinguishes this from the *Lisi* and *Ludecke* cases which were concerned solely with an interpretation of the Warsaw Convention.

Smiegel Brief at 13; see Robles Brief at 8-9. The Montreal Agreement does not have any provision for a sanction for non-compliance with its provisions and cannot, therefore, provide any basis for distinguishing the erroneous holding below from the erroneous holding in *Lisi*.

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[2] *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *affirmed by an equally divided court*, 390 U.S. 455 (1968).

[3] *Ludecke* v. *Canadian Pacific Airlines*, 98 D.L.R. 3d 52 (Can. 1979).

[4] A 10 point type requirement, similar to that of the Montreal Agreement, found in CAB regulations, 14 C.F.R. §221.175, is also cited by Respondents. Smiegel Brief at 13; Robles Brief at 2, 5, 10. It clearly was not a codification of the requirements for the Warsaw Convention "statement". Memorandum for the CAB as Amicus Curiae at 8, *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, 390 U.S. 455 ("the Board did not profess to be codifying or in any way determining what size type may be required by the Warsaw Convention"). Moreover, the CAB regulation contains no support for Respondents' position. A carrier failing to comply with that regulation may be subject to a civil penalty, 49 U.S.C. §1471, but there is no provision in any law or regulation which authorized the court below to impose the sanction of absolute and unlimited liability without fault for compensatory wrongful death

A simple chart of the relevant instruments, circumstances and sanctions graphically illustrates the error of Respondents and the court below.

Instrument	*Circumstance for Sanction*	*Sanction*
Warsaw Convention	failure to deliver ticket (Article 3(2)), untimely delivery of ticket (*Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965)), inadequate "statement" of limitation (*Lisi; contra, Ludecke*).	the carrier cannot exclude or limit liability (Article 3(2))
Hague Protocol	failure to deliver ticket (Article 3(2)), failure to include specified "notice" (Article 3(2))	cannot limit liability (Article 3(2))
Montreal Agreement	none specified	none specified

The Respondents argue for, and the court below has imposed, the Warsaw Convention sanction for a mere technical and insubstantial failure by LOT to comply with the print-size requirements of the Montreal Agreement which does not specify any circumstance for a sanction or indeed for any sanction for non-compliance in any respect. Relying upon *Lisi*, the court below interpreted the private inter-carrier Montreal Agreement as if it had amended the Warsaw Convention treaty in the manner actually accomplished by the Hague Protocol, which never was ratified by the United States.[5]

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damages for failure to comply with the regulation's print size requirement.

Respondents' reference to Petitioner Polskie Linie Lotnicze's (hereinafter LOT) foreign air carrier permit is also inapposite and misleading. Smiegel Brief at 11. The permit only requires LOT to deposit a signed counterpart to the Montreal Agreement with the CAB. Smiegel App. at 3a. LOT did so. Petitioner's App. at 63a-67a (hereinafter Pet. App.).

[5] Had a sanction for non-compliance been provided for in the Montreal Agreement the result would, of course, be different. See

In a veiled attempt to divorce the holding below from the erroneous *Lisi* decision, Respondents also claim that reconsideration of *Lisi* would have no effect in this case.[6]

Montreal Trust Co. v. *Canadian Pacific Airlines*, 72 D.L.R.3d 257 (Can. 1976), Smiegel App. 10a-23a. The Canadian Supreme Court in *Montreal Trust* construed the language of Article 3 as amended by the Hague Protocol (Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October, 1929, September 28, 1955. 478 U.N.T.S. 371 (herein Hague Protocol)), which never was ratified by the United States. The Hague Protocol amended Article 3 to require a "notice", the absence of which resulted in imposition of a sanction. The Supreme Court of Canada recognized the important difference between the unamended (Warsaw Convention) and amended (Hague Protocol) versions of Article 3.

> In relation to a claim for loss of life, art 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was "delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects. . . .

72 D.L.R.3d at 263, Smiegel App. at 22a. Although the "notice" requirement of the Hague Protocol, which is not normally applicable in the United States, may be similar to the more detailed notice requirement of the Montreal Agreement, Respondents blatantly ignore the fact that the Hague Protocol provides its own sanction for failure to supply the appropriate notice whereas the Montreal Agreement does not specify any sanction at all for failure to comply with its provisions. Moreover, the court below itself ignored that distinction. Instead, it interpreted Article 3 of the Warsaw Convention in conjunction with the Montreal Agreement as if the United States had ratified the Hague Protocol. Adoption of the Montreal Agreement between airlines cannot be construed or interpreted as a substitute amendment of the Warsaw Convention in light of the United States' failure to ratify the Hague Protocol. The Montreal Agreement, therefore, did not provide any basis to the court below for imposing the sanction of absolute and unlimited liability without fault.

[6] Respondents also claim the questions presented are not ripe for review because the Montreal Agreement has effectively mooted the Second Circuit's erroneous *Lisi* decision and its conflict with the Canadian Supreme Court's decision in *Ludecke*. Smiegel Brief at

Smiegel Brief at 17. That claim is wrong because it is clear that Respondents and the opinion below mistakenly intermingle the "notice" specifications of the Montreal Agreement with the requirement for ticket delivery in Article 3(2) of the Warsaw Convention, while ignoring the fact that the private inter-carrier Montreal Agreement could not amend in any way Article 3 of the Warsaw Convention treaty. The Second Circuit's implied and erroneous holding[7] that the Montreal Agreement amended the Warsaw Convention and its reliance on the discredited holding of *Lisi* is apparent. The Second Circuit said below:

> The Agreement supplements the Convention in particular respects, but Article 3(2) still imposes on carriers the duty to inform passengers of liability limitations. The failure to do so, as measured either by the terms of Article 3 or the Montreal Agreement, results in forfeiture of the limitation.

705 F.2d at 90, Pet. App. at 13a. The overruling of *Lisi* would remove the only tenuous strand that arguably supports the holding below.

15-16. Relying upon *Lisi*, other courts in the United States have expressed doubt that even the Montreal Agreement notice requirement is sufficient for the Warsaw Convention. *In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1313 n. (9th Cir. 1982). Any such future holding by the Ninth Circuit would clearly result in a conflict with the decisions of the Second Circuit here and the District of Columbia Circuit in *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 379 F.2d 912 (D.C. Cir. 1973), and result in further uncertainty in an area of the law which is intended to be uniform throughout the world. Because of the extreme dislike for limitations of liability, there will be continual litigation in United States courts over what is sufficient to comply with the judicially required "notice" of the limitation of liability in the Warsaw Convention until this Court settles the issue finally. The issue clearly was not settled by *Lisi*.

[7] The implied holding that a private agreement can amend a treaty of the United States standing alone would be sufficient to warrant review by the Court.

Moreover, the Second Circuit apparently concluded that the type-size requirement for the Advice to International Passengers on Limitation of Liability (herein Montreal Advice) in the Montreal Agreement was some sort of codification or standard for the Warsaw Convention "statement" to be measured against.[8] *Id.* That conclusion and Respondents' argument based upon it evolve from a fundamental misconception as to what constitutes the "statement" on the passenger ticket required by the Warsaw Convention.

In conjunction with their attempts to attain uniformity in the area of transportation documentation, the members of the International Air Transport Association (herein IATA) have adopted a Resolution[9] that specifies the type size for the "statement" required by Article 3 of the Warsaw Convention and for the "notice" required by Article 3 of the Warsaw Convention as amended by the Hague Protocol. Pursuant to that Resolution, the "statement" required by Article 3 of the Warsaw Convention is included in paragraph 2 of the Conditions of Contract on the passenger ticket and is required to be printed in 6 point type in a print which is bolder type than the other paragraphs of the Conditions of Contract. IATA Resolution 724(1), Reply App. 1a-2a. The "notice" required by Article 3 as amended by the Hague Protocol is required to be printed in bold letters of 8 point type size. IATA Resolution 724(1)(a), Reply App. 1a.

Because the language of Article 3 of the Warsaw Convention is different from the amended language in the

[8] Respondents also argue to that effect. Robles Brief at 6-7, 10.

[9] IATA Resolution 724, Reply App. 1a-4a. There are IATA resolutions and recommendations on varied subjects involving international aviation. Although adopted by airlines, before becoming effective they are approved by governments. Several governments rely upon IATA to develop the uniformity of documentation necessary for international air transportation.

Hague Protocol,[10] the Warsaw Convention requirement for a "statement" is separate and distinct from the "notice" requirement of the Hague Protocol[11] and, therefore, both a "statement" and "notice" are required to be on IATA's approved uniform passenger ticket. See Reply App. 1a-4a. The Montreal Advice is also considered to be separate and independent of the Warsaw Convention "statement" and the Hague Protocol "notice" and the Montreal Advice is also printed separately with respect to tickets having an origin, destination or stopping place in the United States. Pet. App. 113a.

The Hague Protocol "notice" on the LOT passenger ticket complied with the print-size requirements of IATA Resolution 724. Reply App. 5a. The "statement" required by Article 3 of the Warsaw Convention and included in paragraph 2 of the LOT passenger ticket Conditions of Contract also complied with the print requirements of IATA Resolution 724. See IATA App. 5a. Although the LOT ticket complied in all material respects with the uniform print size requirements adopted by IATA for the "statement" required by Article 3 of the Warsaw Convention, the Second Circuit has inserted the separate and independent print size requirement for the Montreal Advice into the Warsaw Convention and, at the stroke of a pen, destroyed the uniformity which otherwise prevails throughout the world.

The court below failed to distinguish the Montreal Advice's requirements from the Warsaw Convention "statement" requirements. That initial failure precipitated a further failure by the court below to distinguish between the Warsaw Convention treaty sanction and one arising

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[10] See Petition at 20, n.27.

[11] *Accord, Montreal Trust Co.* v. *Canadian Pacific Airlines*, 72 D.L.R.3d 257 (Can. 1976), Smiegel App. 10a-23a.

from the Montreal Agreement.[12] The imposition of a treaty sanction upon LOT for failure to comply with the Montreal Advice print size requirements is illogical and has no legal foundation. LOT complied with Article 3 of the Warsaw Convention and the international uniform print requirements established by IATA for the Warsaw "statement". The Montreal Agreement does not amend in any way Article 3 of the Warsaw Convention and, consequently, by imposing a treaty sanction contained in Article 3 of the Warsaw Convention for a mere technical and insubstantial failure to comply with the Montreal Agreement, the court below has interjected an element of extreme uncertainty as to what will constitute compliance with Article 3 of the Warsaw Convention. *Cf. In Re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1313 n.13 ("We need not decide here whether the notice required by the CAB is adequate to advise a passenger of the effect of the limitation.").

CONCLUSION

The entire rationale of the decision below flows from the clearly erroneous interpretation of Article 3, espoused in *Lisi,* that a failure to give "notice" of the applicability of the liability limitation of the Warsaw Convention results in imposition of the sanction of absolute and unlimited liability for damages without fault. The transposition of the Warsaw Convention treaty sanction, as interpreted in *Lisi,* for a technical violation of the private inter-carrier Montreal Agreement, as if it were an amendment to the treaty, is the critical question that the Court should review to determine whether this is correct treaty interpretation and application. Respondents' protestations to the contrary are

[12] See 49 U.S.C. §1471 (1976).

absolutely incorrect and their attempt at having the Court avoid the substantial and important questions with respect to treaty interpretation raised by the Petition and decision below should be rejected by the Court.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Dated: September 22, 1983

Certificate of Service

I hereby certify that I have, this 22nd day of September, 1983 served the foregoing Reply Brief of Petitioner in support of the petition for a writ of certiorari upon respondents by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Speiser & Krause and Kreindler & Kreindler, counsel of record for respondents, at their respective post office addresses, 200 Park Avenue, New York, New York 10017 and 99 Park Avenue, New York, New York 10016.

September 22,1983

/s/ George N. Tompkins, Jr.
George N. Tompkins, Jr.
Counsel for Petitioner

APPENDIX

IATA Resolution 724

PASSENGER TICKET—CONDITIONS OF CONTRACT

PSC1(01)724 Expiry: Indefinite
PSC2(01)724
PSC3(01)724 Type: A

RESOLVED that,

(1) the 'Notice' and the 'Conditions of Contract' on the Passenger Ticket and Baggage Check used for interline international carriage read as shown in Paragraph (2) below:

(a) the text of the Notice shall be printed in bold letters, eight point size, preferably in Helvetica or similar large character letters and the text of the Conditions of Contract in six point size of the same character;

(b) Paragraph 2 of the text of the Conditions of Contract shall be printed in bolder type than the other paragraphs thereof.

(2) the titles and text of the Notice and Conditions of Contract are:

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed 'Advice to International Passengers on Limitation of Liability'.

IATA Resolution 724

CONDITIONS OF CONTRACT

1. As used in this contract 'ticket' means this passenger ticket and baggage check, of which these conditions and the notices form part, 'carriage' is equivalent to 'transportation', 'carrier' means all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage. 'WARSAW CONVENTION' means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not 'international carriage' as defined by that Convention.

3. To the extent not in conflict with the foregong carriage and other services performed by each carrier are subject to:

   (i) provisions contained in this ticket,

   (ii) applicable tariffs,

   (iii) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

IATA Resolution 724

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route; carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its Agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within seven days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs of conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of car-

IATA Resolution 724

riage. Carrier may refuse transportation if the applicable fare has not been paid.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present exit, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

The following is an actual size reproduction of the Hague Protocol Notice and the Warsaw Convention Statement as contained in the LOT passenger ticket of plaintiffs' decedents.

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed "Advice to International Passengers on Limitation of Liability".

CONDITIONS OF CONTRACT

1. As used in this contract "ticket" means this passenger ticket and baggage check, of which these conditions and the notices form part, "carriage" is equivalent to "transportation", "carrier" means all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage. "WARSAW CONVENTON" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

2. **Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention.**

3. To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to: (I) provisions contained in this ticket, (II) applicable tariffs, (III) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route; carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within 7 days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

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